Supreme Court, U.S.
FILED
95 445 SEP 15 1995
OFFICE OF THE CLERK

No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

PETITION FOR A WRIT OF CERTIORARI

KATHRYN A. OBERLY
787 Seventh Avenue
New York, N.Y. 10019
(212) 773-2500

J. ANDREW HEATON
(Counsel of Record)
1225 Connecticut Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 327-9820

Attorneys for Petitioner

Of Counsel:
DANIEL F. KOLB
JEROME G. SNIDER
Davis Polk & Wardwell
450 Lexington Avenue
New York, N.Y. 10017

PETER J. MCGINN
Tillinghast, Collins & Graham
10 Weybosset Street
Providence, R.I. 02903

60 pp

QUESTIONS PRESENTED

1. Whether the court below erred in holding that a retroactive state statute did not violate Ernst & Young's right to due process under the Fourteenth Amendment, where (a) the statute deprived Ernst & Young of an existing right to contribution recognized as a property interest under state law, (b) the statute weakened Ernst & Young's position in pending litigation with a state entity, and (c) the state entity's stated purpose in seeking passage of the statute was to pressure Ernst & Young to settle the litigation.

2. Whether the court below erred in holding that the same retroactive statute did not violate Ernst & Young's right to due process, even though the statute, as interpreted by the state courts, failed to provide Ernst & Young a meaningful opportunity to participate in settlement approval hearings affecting its rights.

PARTIES TO THE PROCEEDINGS

Petitioner Ernst & Young LLP was a third-party defendant in the proceeding below. Edward T. Broadmeadow, Alfred J. Corso, Larry D. Davidson, Stephen B. Forman, Robert R. Fournier, Geoffrey B. Hopper, Keith R. Phillips, and Michael A. Rizzo — all present or former partners or employees of Ernst & Young LLP — were also third-party defendants below.

Respondents Rhode Island Depositors Economic Protection Corporation and Edward D. Pare, Jr., Receiver of Brown University Employees Credit Union, were plaintiffs below.

Respondents Wilhemina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Viau, John Doe and Jane Doe, former officers and directors of Brown University Employees Credit Union, were defendants and third-party plaintiffs below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
1. Background Of DEPCO And The Credit Unions	3
2. DEPCO's Lawsuit Against Ernst & Young	4
3. Rhode Island's Prior Law Of Contribution	4
4. The Act's New Contribution Scheme	5
5. The Harm To Ernst & Young	6
6. Proceedings Below	7
a. The Federal Court Challenge	7
b. The Settlement With Officers And Directors	8
c. The Decision On The Constitutional Issues	9
REASONS FOR GRANTING THE PETITION	10
I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS ERRONEOUS BECAUSE THE ACT'S RETROACTIVE DEPRIVATION OF ERNST & YOUNG'S RIGHT TO CONTRIBUTION LACKS A RATIONAL BASIS	11
A. Retroactive Legislation Should Be Viewed With Skepticism And Must Have A Rational Basis	11

TABLE OF CONTENTS—Continued

Page

B. The Court Below Erred In Holding That The Act Has A Rational Basis Because It Facilitates Settlements 13

1. This Court Has Noted That Pro Tanto Set-Off Schemes Such As The Act Do Not Promote Settlements And Are Unfair 13

2. The Explanations Offered Below As To How The Act Facilitates Settlements Are Invalid 14

II. THE DECISION BELOW CONFLICTS WITH A VIRGINIA SUPREME COURT DECISION HOLDING THAT A RETROACTIVE DEPRIVATION OF AN EXISTING RIGHT TO CONTRIBUTION VIOLATES DUE PROCESS 18

III. THE DECISION BELOW CONFLICTS WITH FEDERAL DECISIONS HOLDING THAT NON-SETTLING PARTIES HAVE A DUE PROCESS RIGHT TO MEANINGFUL PARTICIPATION IN SETTLEMENT PROCEEDINGS 19

A. In Circumstances Such As Those In This Case, Federal Courts Have Held That Non-Settling Parties Have A Right To Meaningful Participation In Settlement Approval Proceedings 20

TABLE OF CONTENTS—Continued

Page

B. As Interpreted By The Rhode Island Courts, The Act Does Not Afford Non-Settling Parties A Right To Meaningful Participation In Settlement Approval Proceedings..... 21

C. The Court Below Rejected The Contention That The Act Violated Due Process Based Upon The Federal Case Law 23

CONCLUSION..... 23

APPENDIX..... 1a

1. Opinion of the Supreme Court of Rhode Island dated May 19, 1995 ..... 1a

2. Transcript of Oral Decision of the Superior Court of Rhode Island on November 3, 1994..... 21a

3. Order of the Superior Court of Rhode Island dated November 3, 1994..... 26a

TABLE OF AUTHORITIES

Cases:	Page
Bragger v. Trinity Capital Enter. Corp., No. 92 Civ. 2124, 1993 U.S. Dist. LEXIS 10087 (S.D.N.Y. July 23, 1993)	21
Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160 (W.D. Va. 1983)	18
Dash v. Van Kleeck, 7 Johns. 477, 506 (N.Y. Sup. Ct. 1811)	12
Del-Val Fin. Corp. Sec. Litig., In re, 868 F. Supp. 547 (S.D.N.Y. 1994)	21
Ernst & Young v. Rhode Island Depositors Economic Protection Corp., 45 F.3d 530 (1st Cir. 1995)	8
General Motors Corp. v. Romein, 503 U.S. 181 (1992)	12
Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)	21
Gomes v. Brodhust, 394 F.2d 465 (3d Cir. 1967)	21
Jiffy Lube Sec. Litig., In re, 927 F.2d 155 (4th Cir. 1991)	20
Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990)	12
Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994)	11, 12
Leftwich v. Bevilacqua, 635 F. Supp. 238 (W.D. Va. 1986)	19
Masters Mates & Pilots Pension Plan, In re, 957 F.2d 1020 (2d Cir. 1992)	20
McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994)	6, 13-14
Nelson v. Ptaszek, 505 A.2d 1141 (R.I. 1986)	18
O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994)	16

TABLE OF AUTHORITIES—Continued

	Page
Cases:	
Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717 (1984)	12
Potomac Hosp. Corp. v. Dillon, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 474 U.S. 971 (1985)	18-19
Rhode Island Depositors Economic Protection Corp. v. Brown, Nos. 94-668, 94-716 and 94-720, slip op. at 4 (R.I. July 14, 1995)	6, 8, 22
Rhode Island Depositors Economic Protection Corp. v. Brown (In re Advisory Opinion to the Governor), 659 A.2d 95 (R.I. 1995)	*passim*
Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984)	10, 18-19
TBG, Inc. v. Bendis, 36 F.3d 916 (10th Cir. 1994)	16
United States v. Carlton, 114 S. Ct. 2018 (1994)	17
United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth., 772 F. Supp. 1565 (D.S.C. 1991)	16
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	13
Wilson v. Krasnoff, 560 A.2d 335 (R.I. 1989)	5
Statutes and Constitutional Provisions:	
28 U.S.C. § 1257(a)	1
U.S. Const. amend. XIV, § 1	*passim*
R.I. Gen. Laws § 42-116-40, P.L. 1993, ch. 85, § 1	*passim*
R.I. Gen. Laws §§ 10-6-7, 10-6-8 and 10-6-11	4

TABLE OF AUTHORITIES—Continued

Miscellaneous: ..... Page

2 J. Story, *Commentaries on the Constitution of the United States* § 1398 (5th ed. 1891) 12

Mark Dubnoff, *Accounting Firm Sues DEPCO Over New Bailout Law*, Newport Daily News, July 29, 1993 7

Editorial, Providence Business News, July 5, 1993 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

Petitioner Ernst & Young LLP respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Rhode Island.

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island (App., *infra*, 1a) is reported at 659 A.2d 95. The opinion and order of the trial court (App., *infra*, 21a, 26a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on May 19, 1995 (App., *infra*, 1a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

---

[1] By order of Justice Souter, Ernst & Young's time within which to file a petition for a writ of certiorari was extended to and including September 15, 1995.

STATUTORY PROVISIONS INVOLVED

Section 42-116-40 of the Rhode Island General Laws, P.L. 1993, ch. 85, § 1, provides in relevant part:

> Notwithstanding any provisions of law to the contrary, a person, corporation, or other entity who has resolved its liability to the Rhode Island Depositors' Economic Protection Corporation, the receiver of Rhode Island Share and Deposit Indemnity Corporation or the receiver of any state-chartered financial institution in a judicially approved good faith settlement shall not be liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any other joint tortfeasors unless its terms so provide, but it reduces the potential liability of such joint tortfeasors by the amount of the settlement.
>
> The provisions of this section shall apply solely and exclusively to settlements of liabilities to the Rhode Island Depositors' Economic Protection Corporation, the receiver of the Rhode Island Share and Deposit Indemnity Corporation and the receiver of any other state-chartered financial institution and shall not be construed to amend or repeal the provisions of chapter 6 of title 10 relating to contributions among joint tortfeasors, other than as specifically provided herein.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

In 1992, respondent Rhode Island Depositors Economic Protection Corporation ("DEPCO"), an instrumentality of the

State of Rhode Island, sued petitioner Ernst & Young for losses arising out of the failure of Rhode Island's credit union system. In the course of that lawsuit, after Ernst & Young resisted DEPCO's settlement demands, DEPCO's lawyers drafted and convinced the state legislature to enact a statute (the "Act"), applicable only in narrow circumstances, that retroactively deprived Ernst & Young of its right to seek contribution from parties who enter into settlements with DEPCO. The Act also provided that any settlement between DEPCO and other parties would reduce Ernst & Young's potential liability only by the settlement amount (i.e., *pro tanto*), rather than in proportion to the settling party's share of the fault. The stated purpose of DEPCO's counsel in seeking passage of the Act was to pressure Ernst & Young to settle the lawsuit brought by DEPCO.

In the present action, the Rhode Island Supreme Court held that the Act did not violate various provisions of the federal and Rhode Island constitutions. Of particular relevance here, the court concluded that the Act did not violate Ernst & Young's Fourteenth Amendment right to due process of law. In doing so, the court expressly recognized that its holding conflicted with a decision of the Supreme Court of Virginia.

1. Background Of DEPCO And The Credit Unions

On January 1, 1991, the governor of Rhode Island proclaimed a banking emergency and ordered the closing of the Rhode Island Share and Deposit Indemnity Corporation ("RISDIC") and the credit unions it insured. Responding to the effects of this "credit union crisis," the Rhode Island General Assembly enacted legislation creating DEPCO. As a public corporation, DEPCO was charged with the payment of the deposit liabilities of the failed credit unions, the liquidation of their assets, and the pursuit of tortfeasors who contri-

buted to the failure of the credit union system. (App., *infra*, 3a.) DEPCO succeeded in repaying with interest virtually all of the affected deposits, and in mid-1992, Rhode Island's governor announced that the banking emergency had ended.

2. DEPCO's Lawsuit Against Ernst & Young

Ernst & Young had provided certain audit and accounting services to RISDIC and to some of the credit unions. On February 20, 1992, DEPCO filed a lawsuit charging Ernst & Young with negligence, negligent misrepresentation, and breach of contract in connection with those services. (App., *infra*, 4a.)

DEPCO's counsel has made public statements branding Ernst & Young as an opponent of the people and a "deep pocket" from which a large settlement should be extracted. Rhode Island's former governor, who also served as chairman of DEPCO, publicly asserted that Ernst & Young is culpable and that Ernst & Young would not be willing to go to trial before a Rhode Island jury. (Affidavit of William P. Hammer, Jr. ("Hammer Aff.") ¶¶ 13-15 & Exhibit D, submitted in the proceedings below.)

3. Rhode Island's Prior Law Of Contribution

When DEPCO began its lawsuit against Ernst & Young, the law in Rhode Island concerning the effect of a settlement on a non-settling party's right to contribution was the same for all types of claims. The basic rule, in effect since 1940, was that a settlement by one joint tortfeasor did not impair a non-settling defendant's right to seek contribution from that tortfeasor. However, a settling party could be shielded from claims for contribution if the settlement explicitly released non-settling defendants from liability for the settling tortfeasor's proportionate share of any judgment. *See* R.I. Gen. Laws §§ 10-6-7, 10-6-8 and 10-6-11.

This framework provided protection for both settling and non-settling defendants. Non-settling defendants were protected against "the injustice of having one joint tortfeasor pay more than his or her fair share of damages," *Wilson v. Krasnoff*, 560 A.2d 335, 339 (R.I. 1989), because they either received a reduction in their potential liability equal to the settling party's share of the fault, or could seek contribution from the settling party for any portion of a judgment exceeding their fair share. At the same time, settling parties could be protected from the uncertainties of future contribution claims so long as the settlement agreement provided a proportionate share release for non-settling parties.

4. The Act's New Contribution Scheme

Rather than proceeding under the existing framework, DEPCO determined that the law should be changed so that Ernst & Young, which had refused DEPCO's settlement demands, would be deprived of the protections afforded by the existing law. To accomplish this goal, DEPCO's trial counsel in the malpractice action against Ernst & Young drafted the Act. The governor of Rhode Island (who was also chairman of DEPCO) introduced the Act in the General Assembly, and both the governor and DEPCO's trial counsel lobbied extensively for it. On July 13, 1993, DEPCO's chairman — wearing his governor's hat — signed the Act into law.

The Act (now codified as R.I. Gen. Laws § 42-116-40) retroactively extinguished Ernst & Young's right to pursue contribution from parties who settle with DEPCO. Moreover, the Act provides that any judgment assessed against Ernst & Young will be reduced not by the settling parties' proportionate share of the losses, but only by the amounts paid in settlement — a so-called *pro tanto* reduction. The Act applies only to claims brought by DEPCO and by receivers for Rhode Island-chartered financial institutions. In all

other cases, Rhode Island's traditional rule requiring proportionate fault releases (or leaving settling parties liable for contribution) remains in effect. The Act was amended during its passage through the legislature to make this clear.

By its terms, the Act only bars contribution claims against parties who have entered into "good faith" settlements that have been approved by a court. As interpreted by the Rhode Island courts, however, the Act — unlike similar *pro tanto* schemes that have been noted by this Court — does not require a settling defendant to show that the settlement is a "fair forecast of its equitable share of the judgment." *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1468-1469 (1994) (discussing *pro tanto* schemes). *See DEPCO v. Brown*, Nos. 94-668, 94-716 and 94-720, slip op. at 4 (R.I. July 14, 1995) [hereinafter *Brown Settlement Appeal*]. Under the Act, a settlement may receive court approval, and may thus protect a settling party from contribution claims, even if it is grossly inadequate in comparison to the settling party's true share of the fault.

5. The Harm To Ernst & Young

The Act places non-settling parties — and Ernst & Young in particular — at a severe disadvantage compared to the prior law. Under the Act's *pro tanto* approach, a non-settling party may be forced to absorb the difference between the damages caused by a settling party and whatever amount DEPCO accepts from that party in settlement, no matter how insignificant, or how disproportionate to the settling party's fault, that amount may be. Thus, the Act permits DEPCO to settle cheaply with certain parties — even those responsible for directing the affairs of the failed institutions, such as the Rhode Islanders who served on the boards of directors of RISDIC and the credit unions — while leaving Ernst & Young liable not only for its own share of the fault (if any),

but for the settling parties' share as well. Unless Ernst & Young accedes to DEPCO's settlement demands, Ernst & Young faces the prospect of bearing the brunt of liability for the entire RISDIC collapse, even though, as an independent accounting firm, it took no part in managing or operating any of the institutions in question.

These effects were precisely what DEPCO intended. In shepherding the Act through the legislature, DEPCO's trial counsel made it clear that the Act's purpose was to force Ernst & Young into a settlement of the lawsuit brought by DEPCO. (Hammer Aff. ¶ 8.) During legislative hearings on the Act, he argued that the law should be changed only in his litigation to benefit his client. (Hammer Aff. ¶ 14.)[2] Although the Rhode Island legislature does not maintain an official legislative history, it was a matter of public knowledge that Ernst & Young was the party "targeted" by the Act. *See* Mark Dubnoff, *Accounting Firm Sues DEPCO Over New Bailout Law*, Newport Daily News, July 29, 1993, at C6; Editorial, Providence Business News, July 5, 1993, at 18.

6. Proceedings Below

a. The Federal Court Challenge

Two weeks after the Act became law, Ernst & Young challenged the Act in federal court. Ernst & Young contended, *inter alia*, that the Act violated its Fourteenth

---

[2] Although the Rhode Island Supreme Court's opinion did not address these statements alleged by Ernst & Young (and supported by affidavit), DEPCO's counsel has not denied making them. DEPCO's counsel did at one point suggest that Ernst & Young had somehow "mischaracterized" his statements, but he never elaborated on that charge and, notably, did not offer any evidence to rebut the affidavit submitted by Ernst & Young on the issue. *See* Reply Brief of Governor Sundlun, *et al.* at 11, filed in the proceedings below.

Amendment right to due process because it deprived Ernst & Young of an existing right to contribution and was intended to pressure Ernst & Young into settling the DEPCO lawsuit. DEPCO moved to dismiss the complaint on grounds of ripeness and abstention. The district court granted DEPCO's motion. The First Circuit affirmed, solely on ripeness grounds. *Ernst & Young v. DEPCO*, 45 F.3d 530 (1st Cir. 1995).

b. The Settlement With Officers And Directors

In November 1994, DEPCO filed a motion in the Superior Court of Rhode Island seeking court approval of a proposed settlement (the "Brown Settlement") with the officers and directors of one of the failed credit unions. In connection with that motion — even while continuing to urge in the federal proceeding that Ernst & Young's claims were not ripe — DEPCO sought a ruling from the Rhode Island Supreme Court on the same issues, including the due process claim, that Ernst & Young had raised in its federal lawsuit. The Superior Court approved the settlement and certified the constitutional issues to the Rhode Island Supreme Court. (App., *infra*, 26a-27a.)

Ernst & Young appealed from the court's approval of the settlement, arguing that the Superior Court had erred in interpreting the Act in a manner that did not require Ernst & Young, as a non-settling party, to be provided with a meaningful opportunity to participate in the settlement approval process. The Supreme Court affirmed the approval of the settlement, rejecting Ernst & Young's contention that the Act had been misinterpreted by the lower court. *Brown Settlement Appeal*, *supra*, at 4.[3]

---

[3] Although the current proceeding and the *Brown Settlement Appeal* arose out of the same Superior Court order, the Rhode Island Supreme Court determined that Ernst & Young's challenge to the merits of the

c. The Decision On The Constitutional Issues

In briefing before the Rhode Island Supreme Court, Ernst & Young contended that the Act violated Ernst & Young's due process rights because, by changing the contribution rules in the middle of DEPCO's lawsuit against Ernst & Young, the Act retroactively deprived Ernst & Young of a pre-existing property interest recognized by Rhode Island law. Ernst & Young also argued that the Act deprived it of due process because the Act, as interpreted by the Superior Court (and later by the Rhode Island Supreme Court as well), did not provide a meaningful opportunity for Ernst & Young to participate in the settlement approval process.

On May 19, 1995, the Rhode Island Supreme Court issued an opinion rejecting Ernst & Young's constitutional challenge to the Act.[4] On the issue of due process, the court agreed with Ernst & Young that the Act had retroactively deprived Ernst & Young of a recognized property interest. However, the court concluded that the Act was consistent with due process because it facilitated settlements and therefore furthered the purpose of minimizing the potential liability of Rhode Island taxpayers. (App., *infra*, 15a-16a.) In reaching its decision, the court expressly declined to follow the decision of the Supreme Court of Virginia in *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), in which

---

settlement (which raised issues of interpretation of state law) and the certified questions (which raised issues of federal and state constitutional law) should be briefed and decided separately. As a result, no federal issues were raised or decided in the *Brown Settlement Appeal*.

[4] The Superior Court had certified to the Supreme Court questions concerning the constitutionality of the Act under the due process, equal protection, and bill of attainder clauses of the federal Constitution as well as the due process, equal protection and contract clauses of the Rhode Island constitution.

that court held that the retroactive abrogation of a right to contribution and imposition of a *pro tanto* liability scheme would violate due process. (App., *infra*, 14a-15a.)

REASONS FOR GRANTING THE PETITION

In this case, the Rhode Island Supreme Court held that it is consistent with due process for a state entity (DEPCO), the state's governor (DEPCO's chairman), and the state legislature to take action retroactively depriving a private party (Ernst & Young) of a legal right recognized as a property interest under state law, thereby advancing the state entity's announced goal of weakening the position of that private party in pending litigation with the state entity. In effect, the court held that a state may change the rules in the middle of litigation between the state and a private party in order to improve the state's own position in the lawsuit. To our knowledge, no American court outside Rhode Island has ever endorsed this kind of blatant attempt by a governmental party to a lawsuit to "rig the rules" in its favor.

As this Court has recognized, retroactive laws should be reviewed with special care because of the potential for unfairness. Such a review in this case makes clear that the Act's retroactive application is devoid of any rational basis or legitimate purpose. Rather, the Act's alteration of the liability scheme applicable to Ernst & Young in DEPCO's lawsuit represents a naked exercise of governmental power far removed from the general economic or social legislation that is entitled to a presumption of constitutionality. Simply put, the Act violates one of our most fundamental notions of fair process: a participant in a contest in court does not have the right to change the rules in the middle of the contest, for no better reason than to advance its own position.

This Court should grant certiorari to make clear that Rhode Island — in its zeal to save money by making a predominantly out-of-state firm pick up the tab for its "credit union crisis" — has gone too far. Certiorari should also be granted because the decision below conflicts with the Supreme Court of Virginia's decision in *Shiflet v. Eller* holding that the retroactive abrogation of a right to contribution violates due process, as well as with federal court decisions holding that non-settling parties whose rights are affected under a *pro tanto* set-off scheme have a due process right to meaningful participation in settlement approval proceedings.

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS ERRONEOUS BECAUSE THE ACT'S RETROACTIVE DEPRIVATION OF ERNST & YOUNG'S RIGHT TO CONTRIBUTION LACKS A RATIONAL BASIS.

A. Retroactive Legislation Should Be Viewed With Skepticism And Must Have A Rational Basis.

Retroactive legislation such as the Act has long been viewed with considerable suspicion. Indeed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1497 (1994). As Justice Scalia has noted:

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks . . . by English common law . . . and by the Code Napoleon. It has long been a solid foundation of American law. . . . Justice Story said that "retrospective laws are . . . generally unjust; and . . . neither accord with

> sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (2d ed. 1851).

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855-856 (1990) (Scalia, J., concurring). *See also Dash v. Van Kleeck*, 7 Johns. 477, 506 (N.Y. Sup. Ct. 1811) (Opinion of Kent, C.J.) ("There has not been, perhaps, a distinguished jurist . . . , within the last two centuries, who has had occasion to take notice of retrospective laws . . . but has mentioned them with caution, distrust or disapprobation.").

Modern courts — including this Court — have been equally skeptical of retroactive statutes. Just last year, in *Landgraf*, this Court noted that retroactive statutes "raise particular concerns":

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Landgraf, 114 S. Ct. at 1497. *See also General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("problems of unfairness" are "more serious" for retroactive laws than for prospective ones).

To be consistent with due process, a retroactive statute — like any statute — may not abrogate a property interest unless that action is, at a minimum, justified by a legitimate governmental purpose furthered by rational means. *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984). Because of the careful scrutiny that must be afforded to retroactive legislation, however, "a justification sufficient to validate a statute's prospective application under the [due process

clause] 'may not suffice' to warrant its retroactive application." *Landgraf*, 114 S. Ct. at 1497 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)). Not only the statute in general, but also the retroactive effect of the statute in particular, must satisfy the demands of due process.

B. The Court Below Erred In Holding That The Act Has A Rational Basis Because It Facilitates Settlements.

In this case, the court below determined, as a matter of Rhode Island law, that the Act had retroactive effect and deprived Ernst & Young of a property interest recognized by state law. However, the court concluded that the Act was consistent with due process because it rationally furthered the goal of "facilitating settlement of the DEPCO litigation" and therefore "minimizing the taxpayers' liability." (App., *infra*, 15a-16a; *see also* App., *infra*, 9a.) In holding that this purported purpose was sufficient to support the Act, the court below erred.

1. *This Court Has Noted That* Pro Tanto *Set-Off Schemes Such As The Act Do Not Promote Settlements And Are Unfair.*

As this Court has recognized, the notion that *pro tanto* set-off schemes such as the one established by the Act are more effective than proportionate fault rules in facilitating the resolution of disputes is a myth. In *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994), this Court rejected the *pro tanto* approach in favor of a proportionate share rule for admiralty cases. This Court concluded that "the *pro tanto* rule has no clear advantage in promoting settlements" because, under both the *pro tanto* and proportional fault set-off rules, "[t]he parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relation-

ships is sufficient to ensure nontrial dispositions in the vast majority of cases." *Id.* at 1468-1469.

Notably, this Court also found that the *pro tanto* rule *"comes at too high a price in unfairness." Id.* at 1469 (emphasis added). The potential for unfairness under the Act is even greater than that noted in *McDermott*. The Act, unlike the *pro tanto* schemes discussed in *McDermott*, does not require that a proposed settlement bear any reasonable relationship to the settling party's actual share of the fault. *See* pp. 5-6, *supra*. Moreover, the schemes discussed in *McDermott*, unlike the Act, were not "targeted" at a specific party or a particular lawsuit. *See* pp. 6-7, *supra*.

2. *The Explanations Offered Below As To How The Act Facilitates Settlements Are Invalid.*

The Rhode Island Supreme Court did not attempt to explain how, notwithstanding this Court's decision in *McDermott*, the Act might rationally be expected to facilitate settlement of the DEPCO litigation. However, parties and *amici* in the proceedings below offered three separate theories. First, all of the parties supporting the Act argued that the Act could encourage parties sued by DEPCO to settle by protecting settling defendants from contribution claims. Second, DEPCO argued that the Act would encourage DEPCO itself to settle by making settlements less risky and potentially less expensive for DEPCO. Third, one of the *amici* below suggested that the Act would encourage settlement by exposing a non-settling party (i.e., Ernst & Young) to the threat of liability in excess of the party's proportionate share. *See Amicus Curiae* Brief on Behalf of Certain Officers and Staff of Rhode Island Central Credit Union at 14, filed in the proceedings below. None of these proffered justifications for the Act withstands scrutiny.

The "Contribution Protection" Argument. There is no rational relationship between the Act and the purported goal of facilitating settlements by protecting settling parties from contribution claims. As noted above, the Act's *pro tanto* set-off scheme has no clear advantage in promoting settlements. *See* pp. 13-14, *supra*. Moreover, DEPCO has always had the power to provide contribution protection by indemnifying settlors or by granting non-settling parties a proportionate fault release. Thus, the Act does not provide settling parties with any protection that DEPCO could not have provided under the previous law.

The "Cheaper Settlements for DEPCO" Argument. DEPCO argued below that even if it could have settled cases without the Act by granting proportionate fault releases, it did not want to grant such releases because it could not determine the value of what it would be giving up. *See* Brief of Governor Sundlun, *et al.* at 5-6, filed in the proceedings below. Under the Act, by contrast, DEPCO could settle cases with other parties for any amount — no matter how paltry in relation to the settling party's actual liability — without giving up anything, because the "deep pocket" of Ernst & Young could be tapped for any shortfall. Thus, DEPCO contended that the Act has a rational basis because it makes settlements less costly (and therefore more attractive) for the state, even though it does so at Ernst & Young's expense.

The notion that a state may justify the abrogation of a private party's property interest by claiming that such a step was needed to encourage the *state itself* to change its behavior is novel, to say the least: we are aware of no support for such a proposition in this or any other court outside Rhode Island. Further, it is difficult to see how the Act could be considered rational if, as DEPCO suggests, its aim is to encourage DEPCO to enter into settlements even when DEP-

CO cannot determine whether the settlements are fair and adequate in relation to the parties' share of the fault.

Nor can the possibility that the Act could benefit the state economically (at Ernst & Young's expense) justify the retroactive abrogation of Ernst & Young's right to contribution in the course of a pending lawsuit brought by a state entity. If it were, the requirement of a legitimate purpose furthered by rational means would be essentially meaningless: virtually any governmental appropriation of a property interest may enrich the government to some extent. Where rules affecting litigation between the government and private parties are at stake, more is needed to justify tilting the playing field in the government's favor than the mere notion that doing so will save the government money. *Cf. O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (rejecting government's argument that ability to obtain "more money" justified special government rights in litigation); *TBG, Inc. v. Bendis*, 36 F.3d 916, 925 (10th Cir. 1994) ("To the extent there is tension between the goal of promoting settlements and fundamental fairness to litigants, the latter must prevail.") (quoting *United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1575 (D.S.C. 1991)).

The "Excessive Liability" Argument. Undoubtedly, the real purpose of the Act was the one suggested by one of the *amici* below: to coerce Ernst & Young, the only national "deep pocket" sued by DEPCO, into settling with DEPCO by changing the law of contribution so as to expose Ernst & Young to the threat of enormous and disproportionate liability. Singling out Ernst & Young for special pressure was the purpose stated by DEPCO's counsel in lobbying for the Act, and the one recognized by the news media at the time. *See* p. 7, *supra*. But as with the argument that the Act would encourage DEPCO to settle, a *real* purpose is not the same thing as a *legitimate* purpose. There is nothing even remotely

legitimate about rigging the rules in a manner that disadvantages Ernst & Young in pending litigation with the state.

Last year, in *United States v. Carlton*, 114 S. Ct. 2018 (1994), this Court considered the constitutionality of a federal statute retroactively limiting the availability of a tax deduction. The Court upheld the statute against a due process challenge, but did so only after expressly noting that "[t]here was no plausible contention that Congress acted with an improper motive, such as by targeting" certain taxpayers for unfair treatment. *Id.* at 2023. The clear implication was that if Congress *had* acted with an improper motive, the Court's conclusion might well have been different. Even though the statute still would have served the legitimate goal of raising money for the government, it would have done so in an illegitimate manner.

This case is precisely the kind of case that the Court contemplated in *Carlton*. Here, there is every indication that the state of Rhode Island did act with the improper motive of targeting Ernst & Young and, specifically, of pressuring Ernst & Young to settle. Such targeting and pressure cannot constitute a rational means of furthering a legitimate purpose. Rhode Island may no more deprive Ernst & Young of a property interest and thereby coerce Ernst & Young to settle the DEPCO lawsuit than it could subject a criminal defendant to a game of Russian Roulette in order to coerce the defendant to plead guilty. In either case, even if capitulation by the defendant would benefit the state, the means employed to achieve that end would be patently irrational and improper, and therefore inconsistent with due process.

In sum, the Act's retroactive deprivation of Ernst & Young's right to contribution represents a direct interference with Ernst & Young's right to fair process in the DEPCO litigation, and is not rationally related to any legitimate pur-

pose. The Act therefore violates Ernst & Young's right to due process under the Fourteenth Amendment.

II. THE DECISION BELOW CONFLICTS WITH A VIRGINIA SUPREME COURT DECISION HOLDING THAT A RETROACTIVE DEPRIVATION OF AN EXISTING RIGHT TO CONTRIBUTION VIOLATES DUE PROCESS.

The Rhode Island Supreme Court's decision in this case is in direct conflict with the decision of the Supreme Court of Virginia in *Shiflet v. Eller*. *Shiflet* held that applying a state statute retroactively so as to deprive a party of an existing right of contribution would violate due process.

The parties in *Shiflet* had been involved in an automobile accident in 1977. In 1979, Virginia enacted a statute that, like the Act at issue here, barred non-settling parties from seeking contribution from settling parties, but provided for a *pro tanto* reduction in the non-settling parties' liability. In Virginia, as in Rhode Island, a claim for contribution arises at the time of the underlying tort. *See Shiflet*, 228 Va. at 121, 319 S.E.2d at 754; *Nelson v. Ptaszek*, 505 A.2d 1141, 1143 (R.I. 1986); App., *infra*, 12a. Thus, claims for contribution arising out of the automobile accident had arisen in 1977, two years before the statute at issue was enacted.

The *Shiflet* court held that the statute in question could not be applied retroactively to impair a party's pre-existing cause of action for contribution. The court stated: "*Such a retroactive application of the enactment would violate [the party's] due process rights* and would be invalid." *Shiflet*, 228 Va. at 121, 319 S.E.2d at 754 (emphasis added) (citing, *inter alia*, *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160, 164-165 (W.D. Va. 1983) (holding that the retroactive abrogation of a contribution right violated the federal due process clause)). *See also Potomac Hosp. Corp. v. Dillon*,

229 Va. 355, 360, 329 S.E.2d 41, 44-45 (noting the holding in *Shiflet* that retroactive application of a statute adversely affecting an existing right of contribution "violates due process and is therefore unconstitutional"), *cert. denied*, 474 U.S. 971 (1985).[5]

Shiflet makes clear that if Virginia enacted a statute identical to the Act, and with the same effect upon Ernst & Young, that statute would be considered a violation of due process and would therefore be held unconstitutional. Here, in contrast, the Rhode Island Supreme Court rejected Ernst & Young's due process argument and held that the Act was valid, expressly declining to follow *Shiflet*. As a result, the Act has been found to be constitutional even though an identical statute in Virginia would not be. This Court should resolve the conflict.

III. THE DECISION BELOW CONFLICTS WITH FEDERAL DECISIONS HOLDING THAT NON-SETTLING PARTIES HAVE A DUE PROCESS RIGHT TO MEANINGFUL PARTICIPATION IN SETTLEMENT PROCEEDINGS.

Finally, this Court should grant certiorari to resolve a conflict in the courts concerning the due process right of a non-settling party to participate in settlement approval proceedings involving other parties. Ernst & Young contended below that the Act, as interpreted by the Superior Court (and later by the Rhode Island Supreme Court as well),

---

[5] Although the *Shiflet* court did not explicitly state that its decision was based on the due process clause of the Fourteenth Amendment, as opposed to that of the Virginia Constitution, the Virginia clause is interpreted as being co-extensive with the Fourteenth Amendment provision. *See, e.g., Leftwich v. Bevilacqua*, 635 F. Supp. 238, 243 (W.D. Va. 1986).

violated due process, not only for the reasons noted above, but also because the Act did not afford Ernst & Young an opportunity for meaningful participation in such settlement proceedings affecting its rights.[6] The Rhode Island Supreme Court's failure to accept that contention conflicts with the holdings of several federal courts.

A. In Circumstances Such As Those In This Case, Federal Courts Have Held That Non-Settling Parties Have A Right To Meaningful Participation In Settlement Approval Proceedings.

Because the Act bars non-settling parties such as Ernst & Young from seeking contribution from parties who have settled with DEPCO — and provides for only a *pro tanto* set-off — non-settling parties have a clear interest in ensuring that DEPCO's settlements with other parties are reasonable. In circumstances such as these, a number of federal courts have held that non-settling parties must be afforded a meaningful opportunity to participate in settlement approval proceedings. *See, e.g., In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1031 (2d Cir. 1992) ("third party participation in an evidentiary fairness hearing" is "necessary to protect the due process rights of third parties"); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 n.3 (4th Cir. 1991) (contribution bar "exposes the non-settling defendant to liability for any deficiency in the judgment, so a hearing focussing on fairness of the settlement to the non-settling defendant is required").

---

[6] In the separate *Brown Settlement Appeal*, Ernst & Young also contended that the Superior Court had misinterpreted the Act as a matter of state law. The Rhode Island Supreme Court rejected that contention, *see* p. 8, *supra*, and Ernst & Young does not challenge that holding here.

Under these federal court decisions, when third parties object to a settlement, federal courts must "at least evaluate [their] contentions" and "provide [them] with an opportunity for meaningful exposition of their positions." *Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975) (disapproving settlement where third party was denied meaningful participation in fairness hearing). In doing so, the courts consider, *inter alia*, whether the settling parties made "a good faith effort to evaluate the settling defendant's proportional liability," *see In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 559 (S.D.N.Y. 1994); they may hear testimony on that issue and receive deposition transcripts and documentary evidence from the non-settling party. *See Bragger v. Trinity Capital Enter. Corp.*, No. 92 Civ. 2124, 1993 U.S. Dist. LEXIS 10087, at *6 (S.D.N.Y. July 23, 1993). Such participation by non-settling parties guards against the prospect that a plaintiff will accept inadequate settlements from one or more tortfeasors so long as a perceived "deep pocket" remains liable. *Cf. Gomes v. Brodhust*, 394 F.2d 465, 468 (3d Cir. 1967) (*pro tanto* rule leaves "the field of settlement very much open to collusive arrangements between a plaintiff and a favored joint tortfeasor").

B. As Interpreted By The Rhode Island Courts, The Act Does Not Afford Non-Settling Parties A Right To Meaningful Participation In Settlement Approval Proceedings.

As interpreted by the Rhode Island courts, the Act does not afford non-settling parties an opportunity to participate in a meaningful way in the settlement approval process. The Rhode Island courts' approval of a recent settlement between DEPCO and the officers and directors of one of the failed credit unions makes this clear.

When notified of the proposed settlement, Ernst & Young objected because neither it nor the trial court had sufficient basic information upon which to evaluate the adequacy of the settlement and its effect on third parties. The motion for approval of the settlement was filed just two weeks after the filing of the complaint by DEPCO against the officers and directors, and less than one week after Ernst & Young was sued as a third-party defendant. The complaint and third-party complaint contained only conclusory allegations that provided virtually no information regarding the nature or extent of the parties' relative fault or the total damages sought. Moreover, the settling parties offered no evidence concerning the resources of the settling defendants or their potential liability. Ernst & Young sought a meaningful opportunity to participate in the settlement approval process by obtaining and presenting evidence concerning the merits of the case, the potential damages, the relative strength of the parties' positions, and the financial resources of the settling defendants, and asked the Superior Court to consider whether the settlement would improperly infringe on the rights of third parties such as Ernst & Young.

The Superior Court denied these requests. Instead, the court merely entered a conclusory order — drafted by DEPCO's counsel — approving the settlement as "fair and reasonable, made in good faith, and . . . in the best interests of the moving parties and the receivership estate" (App., *infra*, 26a), without any mention of whether the settlement adequately protected Ernst & Young's interests. The Rhode Island Supreme Court later affirmed, confirming that the Superior Court had properly interpreted and applied the Act as a matter of state law. *See Brown Settlement Appeal*, *supra*, at 4. By doing so, that court made clear that the Act does not afford the kind of meaningful opportunity to participate in the

approval process that Ernst & Young had sought, and that the federal cases cited above require as a matter of due process.

C. The Court Below Rejected The Contention That The Act Violated Due Process Based Upon The Federal Case Law.

The Rhode Island Supreme Court has the last word on the meaning of Rhode Island law. However, Ernst & Young contended in the court below, on the basis of the federal precedents, that because the Act's settlement approval process as interpreted by the trial court (and as later affirmed on appeal) deprived Ernst & Young of a meaningful opportunity to participate in the settlement proceedings, it violated Ernst & Young's federal right to due process. By failing to accept that contention, the court below deprived Ernst & Young of an important procedural right and, in doing so, brought itself into conflict with the federal court decisions noted above.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHRYN A. OBERLY
787 Seventh Avenue
New York, New York 10019
(212) 773-2500

J. ANDREW HEATON
(Counsel of Record)
1225 Connecticut Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 327-9820

Attorneys for Petitioner

SEPTEMBER 1995

APPENDIX

APPENDIX

1. Opinion of the Supreme Court of Rhode Island dated May 19, 1995

In re Advisory Opinion to the Governor
(Section 42-116-40 of DEPCO Act)

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION *et al.*

v.

Wilhelmina BROWN *et al.*, Ernst & Young *et al.*

Nos. 94-648-M.P., 94-668-M.P. (PC-94-5369)

Supreme Court of Rhode Island

May 19, 1995

OPINION

SHEA, Justice.

To His Excellency Lincoln Almond, Governor of the State of Rhode Island and Providence Plantations.

We have received from Your Excellency a request for our written opinion in accordance with article 10, section 3, of the Rhode Island Constitution on the following three questions:

> "1. Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?
>
> "2. Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitu-

tion or Article I, Section 2 of the Constitution of the State of Rhode Island?

"3. Whether the provisions of R.I. Gen. Laws Section 42-116-40 constitute an unlawful bill of attainder in violation of Article I, Section 10 of the [United States] Constitution?"

In addition, on September 29, 1994, plaintiffs Rhode Island Depositors Economic Protection Corporation (hereinafter "DEPCO") and Edward D. Pare, Jr., in his capacity as receiver for the Brown University Employees Credit Union, filed a complaint against certain former officers and directors of the Brown University Employees Credit Union alleging that the directors' negligence in the supervision, management, and operation of the credit union caused its failure and resulted in damages to plaintiffs. On October 14, 1994, defendants filed a third-party complaint for contribution and indemnity against Ernst & Young and certain of its present and former partners. On October 14, 1994, defendants filed a motion to certify questions on the constitutionality of G.L. 1956 (1993 Reenactment) § 42-116-40 (hereinafter "DEPCO Act") to this court pursuant to G.L. 1956 (1985 Reenactment) § 9-24-27.

On October 17, 1994 plaintiffs filed a similar motion and on the same day filed a motion seeking the Superior Court's approval, pursuant to the DEPCO Act, of a settlement that plaintiffs and defendants had reached. Despite an objection by third-party defendant Ernst & Young, the trial justice entered an order approving the settlement as fair, reasonable, made in good faith, and in the best interests of the moving parties and the receivership estate, and certified to this court pursuant to § 9-24-27 four essentially similar questions for determination. The questions transmitted by the Governor and those certified by the trial justice differ only in that the

certified questions also request this court's opinion with respect to whether the DEPCO Act constitutes a law impairing the obligation of contracts in violation of article 1, section 12, of the Rhode Island Constitution. We have consolidated these two proceedings and established a joint briefing schedule for the proponents and opponents of the constitutionality of the DEPCO Act. We are responding to the consolidated matters in the form of an opinion. Our findings shall therefore be legally binding.

Before addressing the questions presented, we feel that it is necessary to present a chronology of the facts and procedural history leading to the issues presented before this court. On January 1, 1991, former Governor Bruce Sundlun proclaimed a banking emergency and ordered the closing of the Rhode Island Share and Deposit Indemnity Corporation (hereinafter RISDIC) and the forty-five financial institutions and credit unions it insured, including Brown University Employees Credit Union. As a result of the closing of the credit unions a financial crisis ensued in which depositors were prevented from withdrawing their funds. In response to the resulting financial crisis, the Rhode Island General Assembly enacted emergency legislation establishing the Depositors Economic Protection Corporation, a public corporation obligated to repay depositors whose deposits had been frozen in the failed institutions. *See* G.L. 1956 (1993 Reenactment) chapter 116 of title 42. DEPCO was charged with the payment of the deposit liabilities of the insolvent financial institutions, the liquidation of their assets, and the pursuit of tortfeasors who contributed to the banking crisis. In addition, DEPCO served as the receiver for RISDIC. The DEPCO legislation also created an entirely new financial institution receivership law, as well as statutory priorities for prompt payment to people whose deposits were left uninsured due to the failure of RISDIC.

In the aftermath of the shutdown of RISDIC and its insureds, the State of Rhode Island established a special commission to investigate the credit union crisis. The commission found fault with former officers and directors of the failed institutions, certain large borrowers, the State Department of Business Regulation, the General Assembly and a governor of the State of Rhode Island who held office during that time. The commission assigned a great level of blame to RISDIC and those persons who occupied prominent positions in the RISDIC hierarchy. The commission also focused on the public accounting firm of Ernst & Young, which had provided accounting services to RISDIC and to many of its insureds, as among the parties deserving special mention.

On February 20, 1992, DEPCO filed a complaint against Ernst & Young in Rhode Island Superior Court charging Ernst & Young with negligence, negligent misrepresentation, and breach of contract. The DEPCO complaint seeks damages which allegedly resulted from the failure of Ernst & Young to properly audit and report the financial condition of the failed institutions. The complaint alleges that Ernst & Young issued unqualified (or insufficiently qualified) audit opinions to RISDIC and a number of RISDIC-insured institutions despite obvious patterns of pervasive lending irregularities.

In July of 1993, well after DEPCO initiated suit against Ernst & Young, the General Assembly amended the DEPCO legislation by passing the DEPCO Act, P.L.1993, ch. 85, § 1. The DEPCO Act provides in part:

> "Notwithstanding any provisions of law to the contrary, a person, corporation, or other entity who has resolved its liability to the Rhode Island Depositors' Economic Protection Corporation, the receiver of Rhode Island Share and Deposit Indemnity Corpora-

> tion or the receiver of any state-chartered financial institution in a judicially-approved good faith settlement shall not be liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any other joint tortfeasors unless its terms so provide, but it reduces the potential liability of such joint tortfeasors by the amount of the settlement.
>
> "The provisions of this section shall apply solely and exclusively to settlement of liabilities to [DEPCO] * * *." Section 42-116-40.

Prior to the passage of the DEPCO Act, a non-settling defendant in a RISDIC case could, if found liable, seek contribution from all other joint tortfeasors, save only those who had entered settlements that explicitly released all claims against all potentially responsible parties for the settling tortfeasor's proportionate share of the overall liability. *See* G.L. 1956 (1985 Reenactment) chapter 6 of title 10 (hereinafter Uniform Contribution Among Joint Tortfeasors Act). In essence, the prior contribution law ensured that, if a joint tortfeasor were held responsible for (and paid) more than its ratable share of damages, it could seek contribution from other joint tortfeasors who had not paid their proportionate share of liability. However, under the DEPCO Act a tortfeasor who refuses to settle, but is later found liable at trial, may not bring an action against a settler for contribution. Rather, that tortfeasor may only deduct the full amount of any settlements by joint tortfeasors from the judgment against it.

Two weeks following the approval of the DEPCO Act by the General Assembly, Ernst & Young filed a declaratory judgment action in the Federal District Court for the District of Rhode Island seeking to declare the DEPCO Act unconstitutional. The District Court dismissed the complaint on ripeness and abstention grounds and the First Circuit subsequent-

ly affirmed on appeal. *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530 (1st Cir. 1995).

DEPCO subsequently negotiated the settlement agreement in the Brown University Employees Credit Union case in which the trial justice certified the questions before us. The determination of the constitutionality of the DEPCO Act is the linchpin of the settlement in the underlying cause of action and all future settlements in DEPCO litigation.

I

Equal Protection

> "Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?"

The Fourteenth Amendment to the United States Constitution guarantees to all persons within the jurisdiction of any state "the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Article 1, section 2 of the Rhode Island Constitution provides individuals with equal protection guarantees similar to those contained in the United States Constitution. *In Re Advisory from the Governor*, 633 A.2d 664, 669 (R.I. 1993); *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992).

In order to determine whether the DEPCO Act satisfies equal protection requirements, we begin with the principle that legislative enactments of the General Assembly are presumed to be valid and constitutional. *Kennedy v. State*, 654 A.2d 708, 712 (R.I. 1995); *Kass v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 567 A.2d 358, 360 (R.I. 1989). In addition, the party challenging the constitutional validity of an act carries the

burden of persuading the court that the act violates an identifiable aspect of the Rhode Island or United States Constitution. *Brennan v. Kirby*, 529 A.2d 633, 639 (R.I. 1987).

When deciding if a statute complies with equal protection standards, we must examine both the nature of the classification established by the act and the individual rights that may be violated by the act. *Boucher v. Sayeed*, 459 A.2d 87, 91 (R.I. 1983). If a statute either infringes upon fundamental rights or results in the creation of a suspect classification, the statute must be examined with strict scrutiny. *Id.*; *see, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) ("rigorous" or strict scrutiny is applied in analyzing a statute which infringed upon the right to marry); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (freedom of choice to marry may not be restricted by invidious statutory racial discrimination). If an act employs a gender-based classification, it is subject to a middle-tier scrutiny in which the classification must be substantially related to the achievement of the statutory objective. *Craig v. Boren*, 429 U.S. 190, 204, 97 S. Ct. 451, 460, 50 L. Ed. 2d 397, 411 (1976). Lastly, purely economic legislation that does not disadvantage a suspect class or impinge upon a fundamental right passes constitutional muster if a rational basis exists for it. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985).

The parties concede that the DEPCO Act does not infringe upon a fundamental right or result in the creation of a suspect classification. Therefore we will address the DEPCO Act as an example of economic legislation entitled to rational basis review. In fact, we have on several occasions analyzed DEPCO legislation as economic law and applied a rational basis analysis in reviewing it. *See In re Advisory Opinion to the Governor (DEPCO)*, 593 A.2d 943,

950-51 (R.I. 1991) (upholding constitutionality of DEPCO legislation using rational basis review); *In re Advisory Opinion to the Governor (DEPCO II)*, 593 A.2d 1356, 1360 (R.I. 1991) (same).

The proponents of the DEPCO Act contend that the DEPCO Act is rationally related to the legitimate purpose of resolving the economic consequences of the credit union crisis. They assert that the DEPCO Act provides a necessary incentive to settle claims, and they emphasize that encouraging settlements is a goal that this court has recognized as favored public policy. *Homar, Inc. v. North Farm Associates*, 445 A.2d 288, 290 (R.I. 1982). They claim that without this incentive, settlement of liability claims involving directors, officers, accountants, attorneys, appraisers, borrowers, and insurers of over a dozen failed financial institutions will be virtually impossible.

Ernst & Young asserts that although the DEPCO Act may well be designed to promote settlement, the state may not rely upon an illegitimate or invidious goal when distinguishing among similarly situated persons. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 883, 105 S. Ct. 1676, 1684, 84 L. Ed. 2d 751, 762 (1985); *Zobel v. Williams*, 457 U.S. 55, 65, 102 S. Ct. 2309, 2315, 72 L. Ed. 2d 672, 681 (1982). Ernst & Young cites *Boucher*, 459 A.2d at 94, to demonstrate that this court will find legislation unconstitutional even under the minimal standard of rational basis review.

In *Boucher*, we held that amendments to the state's Medical Malpractice Reform Act in the midst of a so-called "Medical Malpractice Crisis" failed to satisfy rational basis review under the equal protection clause because those amendments gave medical doctors and hospitals special treatment unavailable to other tortfeasors and treated medical

malpractice plaintiffs differently from other plaintiffs. *Id.* In a dispositive pronouncement in *Boucher* we stated, "[a]bsent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants." *Id.* at 93.

In the matter before us, it is important to note that defendants in the RISDIC tort cases are insured under "defense-within-limits" or "wasting asset" insurance policies. Under these policies, the insureds' costs of defense, including attorneys' fees, expert witness fees, and other litigation expenses, are paid by the insurance companies and deducted from the policy limits as they are incurred, thereby reducing the amount of insurance coverage available to pay settlements or satisfy judgments. In the words of the First Circuit, "[t]he banks' collapse proved to be a depositor's nightmare but a lawyer's dream." *Ernst & Young*, 45 F.3d at 532.

We cannot ignore the reality of the situation before us. The possibility that the liability insurance of the failed credit unions may be depleted before any judgment is derived from protracted litigation is not out of the realm of possibility. This court is persuaded that encouraging payment of insurance proceeds to DEPCO in the form of settlements, instead of allowing them to be dissipated through payment of costs of defense of protracted litigation, is certainly a legitimate legislative objective.

In examining whether the DEPCO Act bears a rational relationship to this legitimate state purpose, we must determine whether the Legislature "could rationally conclude that [the DEPCO Act] would effectuate a resolution to a legitimate problem." *Power v. City of Providence*, 582 A.2d 895, 902 (R.I. 1990) (citing *Weinberger v. Salfi*, 422 U.S. 749, 777, 95 S. Ct. 2457, 2472-73, 45 L. Ed. 2d 522, 545-46

(1975)). The equal protection safeguard is offended only if an act "rests on grounds wholly irrelevant to the achievement of the State's objective," and "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393, 399 (1961). Because we cannot conclude that the DEPCO Act is "wholly irrelevant to the achievement" of the state's objectives, we hold that the DEPCO Act is rationally related to legitimate public purposes and therefore must be sustained against an equal-protection challenge. We therefore hold that the DEPCO Act comports with the requirements of equal protection under both the United States and Rhode Island Constitutions.

II

Due Process

> "Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?"

The Due Process Clause of the Fourteenth Amendment provides that "no state shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Due process prohibits legislation that would retroactively unreasonably impair substantive rights, or "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, U.S. , , 114 S. Ct. 1483, 1505, 128 L. Ed. 2d 229, 262 (1994). To comport with the requirements of due process, a statute may not retroactively abrogate a property interest unless that action is, at a minimum, justified

by a legitimate legislative purpose furthered by rational means. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718, 81 L. Ed. 2d. 601, 611 (1984). Further, this court when confronted with a due process challenge to a retroactive statute, has traditionally held that the purpose of a statute must be such that, on balance, outweighs the unfairness of retroactivity. *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 870 (R.I. 1987); *Raymond v. Jenard*, 120 R.I. 634, 639, 390 A.2d 358, 360 (1978).

The first step in our analysis of whether the DEPCO Act is violative of due process is to determine if the Act is indeed retroactive in nature. The proponents of the constitutionality of the DEPCO Act assert that a cause of action for contribution accrues when a party pays more than his or her fair share of the liability, and not when the underlying tort occurs. *See, e.g., Coniaris v. Vail Associates, Inc.*, 196 Colo. 392, 395, 586 P.2d 224, 225 (1978) ("no cause of action [for contribution] accrues to a joint tortfeasor until there has been a judgment against him [or her] or a settlement of the claim"); *Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 14 N.J. 372, 382, 102 A.2d 587, 591 (1954) (contribution claim "accrues only on the payment by a joint tortfeasor"); *National Mutual Insurance Co. v. Whitmer*, 70 Ohio St. 2d 149, 152, 435 N.E.2d 1121, 1123 (1982) (contribution claim "accrues when a party has paid more than his [or her] share of the joint obligation"). Because Ernst & Young did not hold an accrued contribution or indemnity claim as of the statute's effective date, the proponents contend that the statute could not have acted retroactively upon any such claim.

The United States Supreme Court stated that in determining whether a statute is retroactive one must look to see "whether the [statute] attaches new legal consequences to events completed before its enactment." *Landgraf*, U.S. at ,

114 S. Ct. at 1499, 128 L. Ed. 2d at 255. In *Nelson v. Ptaszek*, 505 A.2d 1141, 1143 (R.I. 1986), we held that a right of contribution exists prior to payment of more than one's pro rata share of a judgment or settlement, and is a claim or cause of action that could be discharged by a general release. It is noteworthy that in *D'Onofrio Construction Co. v. Recon Co.*, 255 F.2d 904 (1st Cir. 1958), the First Circuit interpreted Rhode Island law holding that a cause of action for contribution exists if the event has already occurred out of which a common liability may be asserted to have arisen, and if the injured party has already commenced an action against one of the possible joint tortfeasors. *Id.* at 908-09.

In the case at bar it is evident that before the DEPCO Act was adopted, Ernst & Young held a claim for contribution against all potential tortfeasors arising out of their past actions concerning RISDIC and the credit unions. The DEPCO Act proceeded to eliminate this right as against tortfeasors who settle with DEPCO. In fact "[a] majority of the courts that have decided when a contribution cause of action arises have concluded that it arises when the underlying tort is committed." *Lightner v. Duke Power Co.*, 719 F. Supp. 1310, 1315 (D.S.C. 1989). Rhode Island stands with the majority and therefore, in accord with the reasoning of *Landgraf*, we hold that the DEPCO Act indeed has a retroactive effect.

We are also persuaded that Ernst & Young's pre-existing right to contribution is properly viewed as a property interest subject to the protections of due process. A cause of action, even one of uncertain value is indisputably "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265, 273 (1982). The proponents of the constitutionality of the DEPCO Act urge this court to find that Ernst & Young did not

have a "vested" property right to contribution subject to due process protections at the time of the enactment of the DEPCO Act. We have recognized the concept of "vesting" as being merely conclusory and disfavored when considering due process challenges. *Raymond v. Jenard*, 120 R.I. at 638, 390 A.2d at 360 (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960)). According to Hochman:

> "from an analysis of the cases it becomes apparent that it is impossible to reduce the potentially infinite variety of situations in which the problem of retroactivity can arise to a single common denominator. However, it is just as clear that the factor most often appearing in these cases is the extent to which the parties have laid reasonable reliance on the law existing at the time of the conduct whose legal consequences the retroactive statute would alter. The importance of this element is apparent when one considers that in very general terms the two major factors to be weighed in determining the validity of a retroactive statute are *the strength of the public interest it serves and the unfairness created by its retroactive operation*, and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter." (Emphasis added.) Hochman, 73 Harv. L. Rev. at 727.

The proponents of the DEPCO Act assert that it is ludicrous for Ernst & Young to argue that they relied on the prior contribution statute in committing negligent acts. In the case at bar, Ernst & Young asserts that they relied on the existing Rhode Island contribution system at the time it began its work for RISDIC and the credit unions. Ernst & Young argues that it considered its risks, including litigation risks, as part of its determination of whether to accept RISDIC and the

credit unions as clients. Its argument follows that if it had been aware that its work for RISDIC and the credit unions would be subject to different and harsher rules than its work for other Rhode Island clients, and that its litigation exposure could increase dramatically, it might well not have taken them as clients as it did.

We find this reasoning less than persuasive. It is highly unlikely that a sophisticated accounting firm would rely upon speculative joint tortfeasor contribution in deciding to perform negligent acts.

Although a statute has retroactive effect that implicates property rights, it does not necessarily follow that the statute is unconstitutional. *See Brennan v. Kirby*, 529 A.2d at 640-641 (upholding statutory denial of seniority rights provided to combat veterans); *Raymond v. Jenard*, 120 R.I. at 640, 390 A.2d at 361 (finding that public interest in applying comparative negligence outweighed unfairness because defendant could not have relied on contributory negligence rule in giving firecracker to minor). This court has traditionally employed a balancing test in cases involving retroactive statutes in which the court weighs the public interest in retroactivity against the unfairness created. The unfairness of a retroactive statute is "measured best by the party's reliance on the preexisting state of the law." *Brennan*, 529 A.2d at 640. If the unfairness outweighs the benefit, the statute lacks a rational basis. *Lawrence*, 523 A.2d at 870-71.

Ernst & Young argues that the DEPCO Act's alteration of the liability scheme represents a "naked exercise of governmental power far removed from the general economic or social legislation that is entitled to a presumption of constitutionality." Ernst & Young contends that a participant to a contest, such as DEPCO, does not have the right to

change the rules in the middle of a contest for no better reason than to advance its own position.

Ernst & Young argues that the Supreme Court of Virginia addressed the issue presented in the case at bar, holding that the retroactive abrogation of an inchoate cause of action for contribution violates due process. *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984). In *Shiflet*, the case presented a situation in which parties were involved in an automobile accident in 1977. *Id.* at 117, 319 S.E.2d at 752. In 1979, the Virginia Legislature enacted a statute, similar to the DEPCO Act, that barred non-settling parties from seeking contribution from settling parties, but provided for a pro tanto reduction in the non-settling parties' liability. *Id.* In *Shiflet*, the Supreme Court of Virginia, focusing on whether the right to contribution involves substantive or procedural rights, was persuaded that if any substantive right is involved, "then any statute affecting that right cannot be applied retroactively to a cause of action which accrued prior to enactment of the statute in question." *Id.* at 120, 319 S.E.2d at 753. The court concluded that the legislation affected the substantive right to contribution, and therefore was violative of due process. *Id.* at 123, 319 S.E.2d at 755.

We are not persuaded by *Shiflet*. Rhode Island jurisprudence in the area of due process challenges to retroactive legislation is characterized by a balancing test not evident in *Shiflet*. There is a great public interest in minimizing the taxpayers' liability for the depositor bailout. This legislation was adopted subsequent to a crisis of monumental proportions affecting the well-being of thousands of Rhode Island depositors. We agree that facilitating settlement of the DEPCO litigation in light of the depletion of the credit union insurance policies would ultimately relieve to some extent the taxpayers' cost of the bailout. Balancing this public interest against the alleged unfairness to Ernst & Young to be denied

its pre-existing right to contribution, we come to the conclusion that the State of Rhode Island's interest prevails. Therefore we hold that the DEPCO Act does not offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution nor the Rhode Island Constitution.

III

Bill of Attainder

> "Whether the provisions of R.I. Gen. Laws Section 42-116-40 constitute an unlawful bill of attainder in violation of Article I, Section 10 of the [United States] Constitution?"

The United States Constitution provides in part that "[no] state shall * * * pass any bill of attainder." U.S. Const. Art I, § 10. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803, 53 L. Ed. 2d 867, 907 (1977). The prohibition against bills of attainder was intended to safeguard against legislation penalizing a particular person or group by taking away life, liberty or property because the Legislature judged them guilty of conduct deserving punishment. *United States v. Lovett*, 328 U.S. 303, 317, 66 S. Ct. 1073, 1080, 90 L. Ed. 1252, 1260 (1946). Ernst & Young asserts that the DEPCO Act is a bill of attainder because, despite its general language, the Act seeks to punish Ernst & Young for its role in connection with the collapse of the RISDIC system by limiting Ernst & Young's contribution rights.

To determine whether a statute unconstitutionally inflicts punishment, the United States Supreme Court has established a three-part inquiry:

> "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852, 104 S. Ct. 3348, 3355, 82 L. Ed. 2d 632, 643 (1984).

The denial of access to the courts, or prohibiting a party from bringing an action, has been defined as punishment by bills of attainder. *See, e.g., Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 238-39, 21 L. Ed. 276, 277-78 (1873); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320-21, 18 L. Ed. 356, 362 (1867) (denying confederate sympathizers any access to court held unconstitutional). However, the shifting of economic burdens so as to place a greater share on a particular party is generally not the type of punishment considered violative of the bill of attainder clause. *See Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 728 (9th Cir. 1992); *United States v. Monsanto Co.*, 858 F.2d 160, 175 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156, 104 L. Ed. 2d 1019 (1989) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) did not constitute an unlawful bill of attainder). In *Monsanto*, the Court of Appeals for the Fourth Circuit upheld the constitutionality of CERCLA in the face of bill of attainder challenges. The court held:

> "CERCLA does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not

> intended to operate, nor does it operate in fact, as a criminal penalty or punitive deterrent." *Monsanto*, 858 F.2d at 174-75.

Likewise we hold that the DEPCO Act is intended to promote the settlement of claims, not operate as a criminal penalty.

The second element considers whether, viewing the Act reasonably and in light of the type and severity of the burdens imposed, the Act furthers a nonpunitive purpose. *Selective Service System*, 468 U.S. at 852, 104 S. Ct. at 3355, 82 L. Ed. 2d at 643. The proponents of the DEPCO Act contend that the Act is designed to promote settlements, decrease the amount and cost of litigation relating to the RISDIC collapse, thus saving the taxpayers of Rhode Island. Given the DEPCO Act's goal of encouraging settlements and saving the amount and cost of litigation, the statute could reasonably be said to further non-punitive legislative purposes.

Finally, the court must consider the argument that the Rhode Island General Assembly fostered an intent to punish Ernst & Young through the enactment of the DEPCO Act. "Judicial inquiries into [legislative] motives are at best a hazardous matter," when bill of attainder challenges are brought before the courts. *See Planned Parenthood, Inc. v. Wichita*, 729 F. Supp. 1282, 1290 (D. Kan. 1990) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S. Ct. 1367, 1376, 4 L. Ed. 2d 1435, 1448 (1960)). Even if there were comments by legislators that a specific person or class of persons was a target of the DEPCO Act, this alone would not be sufficient to prove that the DEPCO Act was a bill of attainder. *See Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 403 (N.D.N.Y. 1987), *vacated in part, appeal dismissed*, 888 F.2d 230 (2d Cir. 1989). Neither the Legislature nor this court could accurately predict whether the DEPCO Act will work to the advantage or disadvantage of Ernst

& Young or any other party. Consequently no punitive motive can be discerned.

The Rhode Island General Assembly has no formal record of legislative history accompanying this or any other act it has ever passed. However, it is important to note that the bill of attainder clause is rarely used to invalidate legislation. The policy behind its sparing use is that:

> "[A]ll modern legislation regulating the economic activities of specific groups might be considered 'punishments,' and the bill of attainder clause, if read too broadly, could be used to cripple the ability of legislatures to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or industries which are deemed responsible for the problem." *Cuomo*, 666 F. Supp. at 403.

The burden thrust upon Ernst & Young by the DEPCO Act is choosing whether to settle the case, or continue its defense, with the potential of increased exposure if DEPCO enters into settlement agreements with other joint tortfeasors. The burden faced by Ernst & Young is no different from the burden faced by other defendants in DEPCO suits. For these reasons and from a plain reading of the DEPCO Act, we do not find a legislative intent to punish Ernst & Young. Therefore, we hold that the DEPCO Act cannot be construed as an unlawful bill of attainder.

IV

Contract Clause

> "Whether the provisions of R.I. Gen. Laws § 42-116-40 * * * constitute a law impairing the obligation of contracts in violation of Article I, Section 12 of the Constitution of the State of Rhode Island?"

The United States and Rhode Island Constitutions provide that no "law impairing the obligation of contracts, shall be passed." U.S. Const., Art. I, § 10; R.I. Const. art. 1, § 12. In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983), the United States Supreme Court announced the following three-part test to determine whether legislation unconstitutionally impairs the obligation of contracts. First, has the state law in fact substantially impaired a contractual relationship? *Id.* at 411, 103 S. Ct. at 704, 74 L. Ed. 2d at 580. Second, if the law constitutes a substantial impairment, can the state show a legitimate public purpose behind the regulation, "such as the remedying of a broad and general social or economic problem"? *Id.* at 411-12, 103 S. Ct. at 704-05, 74 L. Ed. 2d at 581. Third, is the legitimate public purpose sufficient to justify the impairment of the contractual rights? *Id.* at 412, 103 S. Ct. at 705, 74 L. Ed. 2d at 581.

At the outset, we see no contractual right that is impaired by this legislation. The Uniform Contribution Among Joint Tortfeasors Act, G.L. 1956 (1985 Reenactment) chapter 6 of title 10, as the common law that preceded it (wherein no contribution was provided among joint tortfeasors), arises out of the law of the state and not from any private agreement. We have previously stated in a contract clause challenge to DEPCO legislation that "even if we were to find an impairment of the contractual relationship, that impairment would be sufficiently justified by the legitimate public purpose of returning funds to deposit creditors and eventually to the Rhode Island economy." *In Re Advisory Opinion to the Governor (DEPCO)*, 593 A.2d 943, 949 (R.I. 1991). Likewise, in the controversy before us there is a legitimate purpose of returning funds to the public. Therefore the DEPCO Act is not a law impairing the obligation of contracts in violation of the State and Federal Constitutions.

For the foregoing reasons we are of the opinion that the DEPCO Act is constitutional. The questions transmitted by the Governor and the questions certified by the Superior Court are answered in the negative.

2. Transcript of Oral Decision of the Superior Court of Rhode Island on November 3, 1994

* * *

THE COURT: It is beyond peradventure that courts favor settlement among litigants. The Rhode Island Supreme Court, as a matter of public policy, has so stated. That public policy is particularly apt where, as here, the public itself has a direct, pecuniary interest in the litigation. After all, the proceeds obtained from this proposed settlement, if approved, are, in large part, to be used to help defray the taxpayers' ultimate burden which was eventually brought about by the 1991 banking crisis.

Thus, whenever extensive or protracted litigation can be obviated by settlement, thereby saving enormous judicial resources, and whenever that settlement will also redound and, indeed, is intended to redound to the financial benefit of the citizenry, such a proposed settlement would appear, at the very outset, to be on the right track.

Add to that, the fact that the settlement contemplates that the defendants' carrier will apparently pay virtually all of the insurance policy limits in order to resolve the dispute, and the significance of the settlement takes on a more impressive note. In addition, the settlement becomes even more attractive because the policy itself is a defense-within-limits type of policy, also known as a "wasting-assets" policy, so-called, which — if the case had to be tried or extensively litigated — could potentially be depleted or so diminished by the costs of defense as to leave the defendants without the wherewithal to

proceed to the end fully represented or, alternatively, to leave the plaintiffs without the wherewithal to recover their damages if they were successful.

Accordingly, this Court is of a strong mind to approve this settlement, absent some compelling reasons not to. The only objector — notwithstanding Mr. Kolb's *pas de deux* this morning — is Ernst & Young. Ernst & Young is an objector this morning. The papers say so, as do documents filed with the Court, which note the name Ernst & Young as objectors.

Ernst & Young is a third party defendant in this case. Ernst & Young claims that its position will be jeopardized in light of the subject statute, namely Section 42-116-40 of the Rhode Island General Laws, if the Court approves this settlement, and that therefore the Court ought not approve the settlement without more information to insure that the settlement is fair, reasonable and adequate.

Ernst & Young has the argument backwards, it seems to me. It is the operation of the statute about which Ernst & Young, in actuality and in reality, is complaining. That statute effectively prohibits indemnity or contribution suits against joint tortfeasors who settle with DEPCO. After all, if it weren't for that statute, Ernst & Young wouldn't be here this morning complaining, as they do, about this proposed settlement. It is the statute, not the settlement, which is really at issue here and which underlies Ernst & Young's motivation to delay this settlement.

For the reasons I have already alluded to, I have no reason to believe that this settlement should not be approved. Any notion that this settlement is somehow born of misguided collusion, or for lack of arms length negotiations between the settling parties is simply baseless. In fact, if intensity were palpable, it would be marked as Court Exhibit Number 1, as evidence of and testament to the heated and

exasperating written exchanges of dialogue to which I have been privy, by copies from the parties, during the past few years as efforts to resolve conflicts between the plaintiffs and the directors and officers from all of the various failed institutions — not just Brown University Employees Credit Union — became more and more strained.

This Court is absolutely satisfied that, based upon the tug-of-war history of these parties, a settlement which finally resolves all of those conflicts ought to be approved. Any suggestion that this proposed resolution is at this juncture somehow the result of collusion or bad faith is simply wrong.

Again, I repeat what I said earlier, it is really not the settlement which Ernst & Young cannot abide today. It is, in actuality, the operation of the statute which Ernst & Young finds unpalatable. Indeed, one need look only to the fact that over a year ago Ernst & Young specifically complained in federal court that the statute was unconstitutional. Thus far, that complaint has been rejected by two federal judicial officers. In fact, the federal district court judge who denied Ernst & Young's overtures said at page 13 of his memorandum decision, "Finally, interests of federalism favor abstention. The collapse of the RISDIC system had a profound effect on the State of Rhode Island. The General Assembly attempted to address the problem by passing the DEPCO legislation. This Court is loathe to consider the federal issues of a singular provision of a comprehensive state act, where that provision has not been interpreted or applied by the State."

Yet, Ernst & Young now seeks to prevent the certification to our State Supreme Court of the very issues which Judge Boyle indicated should be determined by that tribunal. That seems to me a rather anomalous position to take. Quite obviously, Ernst & Young does not concede the constitu-

tionality of the statute. Its efforts in the federal forum clearly reflect a contrary posture. The issue must be resolved. Its resolution by our State Supreme Court is the lynchpin of this proposed settlement. Indeed, so imperative is the Supreme Court's review of this portion of the statute that the Governor of Rhode Island himself has also sought the Supreme Court's opinion.

The fact that a federal suit has been filed scarcely divests this State's highest court from jurisdiction of deciding the constitutional issues. Indeed, as I already earlier mentioned, the federal district court abstained from offering its views for the very reason that the State's judicial branch had not yet ruled on this portion of the Act. The sentiments expressed by Judge Boyle at page 13 of his decision, which I read a moment ago, were renewed by him at page 17 wherein he said, "The validity of the DEPCO Act has not yet been determined by the Rhode Island judiciary . . . The facts of this case coupled with the ongoing state suit provide a strong basis on which to abstain."

Ernst & Young also suggests that certification be withheld until this court can somehow divine the General Assembly's intent in passing the statute. To the extent there exists any legislative history, which is highly unlikely, certification ought in no way to be denied simply because Ernst & Young believes the statute's legislative history might somehow be of interest. A similar overture was made by Ernst & Young to Judge Boyle, and it was abandoned when Ernst & Young apparently could provide no authority to counter the judge's remark that there is no legislative record in Rhode Island. In any event, this Court will not invite an evidentiary hearing so that Ernst & Young can somehow create or re-create legislative history after enactment of this statute.

A ruling by our Supreme Court on the constitutionality of this statute, which Ernst & Young has vigorously contested in every federal forum of the First Circuit, from the magistrate level upwards, is of penultimate importance. The Governor has requested an advisory opinion. The parties who intend to settle this action seek that Court's opinion. And, Ernst & Young — irrespective of its efforts to shun this State forum — will, in all probability, ultimately have to accept our State Supreme Court's opinion, because even if Ernst & Young persuades the First Circuit to remand the case to the District Court it would appear very likely, based upon comments made by the district court judge, that the federal court will itself certify the constitutional question to the Rhode Island Supreme Court.

In all, I am satisfied that the proposed settlement should be approved, that the questions identified by the parties should be certified to the Supreme Court of Rhode Island, and that an order staying further proceedings in this action in this Superior Court should be entered pending action by the Supreme Court. Mr. Carroll, Mr. Decof, if you have an appropriate order you wish to submit to me for purposes of memorializing my comments, I will accept it and sign it.

MR. DECOF: I will have to prepare one and have it for you this morning, Your Honor.

* * *

3. Order of the Superior Court of Rhode Island dated November 3, 1994

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION *et al.*

v.

Wilhelmina BROWN *et al.*, Ernst & Young *et al.*

C.A. No. 94-5369

Superior Court of Rhode Island

November 3, 1994

ORDER

This civil action was before the court, Mr. Justice Krause, on November 3, 1994, on plaintiffs' Motion for Approval of Settlement and on motions of plaintiffs and defendants for an order certifying questions to the Rhode Island Supreme Court, pursuant to R.I. Gen. Laws § 9-24-27, regarding the constitutionality of R.I. Gen. Laws § 42-116-40 of the Rhode Island Depositors Economic Protection Act (the "DEPCO Act") and for a stay of discovery or other proceedings. Upon consideration of the motions and arguments of counsel and for the reasons set forth in the court's decision issued on November 3, 1994, the motions are GRANTED and it is hereby ORDERED:

1. That this Court approves the settlement reached between plaintiffs and defendants, the Court having found that the settlement is fair and reasonable, made in good faith, and is in the best interests of the moving parties and the receivership estates.

2. That the following questions are certified to the Rhode Island Supreme Court pursuant to § 9-24-27:

a. Whether the provisions of R.I. Gen. Laws § 42-116-40 violate the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution or Article I, § 2 of the Constitution of the State of Rhode Island?

b. Whether the provisions of R.I. Gen. Laws § 42-116-40 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, § 2 of the Constitution of the State of Rhode Island?

c. Whether the provisions of R.I. Gen. Laws § 42-116-40 constitute an unlawful bill of attainder in violation of Article I, § 10 of the United States Constitution or constitute a law impairing the obligation of contracts in violation of Article I, Section 12 of the Constitution of the State of Rhode Island?

3. That the clerk of this Court is directed to transmit to the Supreme Court the above-certified questions, together with the file and record of this action;

4. All proceedings and discovery in this case are stayed pending further action by the Supreme Court.

Entered as an order of this Court on this 3rd day of November, 1994.

PER ORDER:
s/ Joseph Maggiacomo
Deputy Clerk 11/03/94

ENTER:
s/ R.D. Krause
11/3/94

Presented by
Counsel for Plaintiffs
DECOF & GRIMM
One Smith Hall
Providence, R.I. 02903
(401) 272-1110

s/ Leonard Decof
Leonard Decof Bar #0688

Supreme Court, U.S.
FILED
OCT 13 1995
CLERK

No. 95-445

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,
v.
RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF FOR RESPONDENTS RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, EDWARD D. PARE, JR., AND ALLAN M. SHINE IN OPPOSITION

LEONARD DECOF
JOHN S. FOLEY
HOWARD B. KLEIN
DECOF & GRIMM
One Smith Hill
Providence, RI 02903
(401) 272-1110

H. BARTOW FARR, III *
FARR & TARANTO
2445 M Street, NW
Suite 225
Washington, DC 20037
(202) 775-0184

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

21 pp

QUESTIONS PRESENTED

1. Whether a state law protecting settling defendants from suits for contribution by non-settling defendants, while providing non-settling defendants with a dollar-for-dollar offset against potential liability, has a rational basis.

2. Whether petitioner—who was given, and took advantage of, the opportunity to file briefs and present argument about the merits of a settlement with a joint tortfeasor—was deprived of procedural due process.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
DISCUSSION	8
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	Page
Duffy v. Hartsock, 187 Va. 406, 46 S.E.2d 570 (1948)	15
Ernst & Young v. Depositors Economic Protection Corp., 862 F. Supp. 709 (D.R.I. 1994)	4
Ernst & Young v. Depositors Economic Protection Corp., 45 F.3d 530 (1st Cir. 1995)	2, 4
General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992)	9
In re Jiffy Lube Securities Litigation, 927 F.2d 155 (4th Cir. 1991)	16
In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020 (2nd Cir. 1992)	16
Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994)	9
McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994)	11, 12, 13
Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984)	*passim*
Rhode Island Depositors Economic Protection Corp. v. Brown, 661 A.2d 969 (R.I. 1995)	5
Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984)	14, 15
Strickland v. Simpkins, 221 Va. 730, 273 S.E.2d 539 (1981)	15
United States v. Carlton, 114 S. Ct. 2018 (1994)	9, 12, 13, 14
United States v. Darusmont, 449 U.S. 292 (1981)	12
United States v. Hemme, 476 U.S. 558 (1986)	12
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	9, 12, 15
Vigneau v. LaSalle, 111 R.I. 183, 300 A.2d 642 (R.I. 1973)	16
Welch v. Henry, 305 U.S. 134 (1938)	12
Statutes	
42 U.S.C. § 9613(f)(2)	3, 12
Other Materials	
Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 63 (1955)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-445

ERNST & YOUNG LLP,

Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

---

BRIEF FOR RESPONDENTS RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, EDWARD D. PARE, JR., AND ALLAN M. SHINE IN OPPOSITION

STATEMENT

This case involves a challenge by petitioner to a Rhode Island statute that, in certain cases, protects settling defendants from suits for contribution by non-settling defendants. The Supreme Court of Rhode Island upheld the statute against various claims of unconstitutionality, holding that the law was a rational means of promoting settlement. Pet. App. 1a-21a.

a. Nearly five years ago, the then-Governor of Rhode Island proclaimed a banking emergency in that State.

Concerned about possible insolvency of the Rhode Island Share and Deposit Indemnity Corporation (RISDIC),[1] Governor Sundlun ordered the closing of the financial institutions and credit unions that it had insured. Pet. App. 3a. As a result, depositors with accounts in those institutions were prevented from withdrawing their funds. Pet. App. 3a. A receiver was then appointed for RISDIC.

The Rhode Island Legislature subsequently enacted legislation creating the Depositors Economic Protection Corporation (DEPCO),[2] and charged it with the obligation to repay depositors with accounts in the closed institutions. Pet. App. 3a. In addition, the legislature gave DEPCO two other important responsibilities: liquidating the institutions' assets and obtaining recovery from those responsible for the crisis. As to the first task, DEPCO has been highly successful: it has repaid full principal to depositors, along with most interest.

The prosecution of lawsuits against potential tortfeasors proved more troublesome. Although "[a] special state commission charged with investigating the banking crisis found no shortage of miscreants," *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 532 (1st Cir. 1995),[3] the extensive litigation initiated by

---

[1] "The Rhode Island General Assembly chartered RISDIC in 1969 as a private deposit-insurance corporation. It began operations in 1971, subject only to state, not federal, regulation. Depositors tended to view RISDIC as a state-sponsored enterprise, and its proprietors—the banks and credit unions that dealt with it—did nothing to dispel this misconception." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 532 n.1 (1st Cir. 1995).

[2] Unlike RISDIC, *see* note 1 *supra*, DEPCO is a public corporation.

[3] As the Court below noted, the commission found fault with, among others, former officers and directors of the institutions, certain large borrowers, and various state officials, as well as RISDIC and its officials. Pet. App. 4a. Moreover, the Court observed, "[t]he commission also focused on the public accounting firm of Ernst & Young, which had provided accounting services to RISDIC and to

DEPCO was further complicated by the unsurprising fact that many of the defendants sought to shift blame among themselves. These corollary disputes led to two problems: first, it made suits brought by DEPCO more costly and time-consuming and, second, it made settlements with any particular defendant more difficult. This is because, as a general rule, Rhode Island law provides that a settling defendant remains potentially liable to other defendants for its proportionate share of liability. *See* Pet. App. 5a. In addition, the insurance policies covering officers, directors, and a broad range of other defendants and putative defendants were "wasting-asset policies" that deduct costs of defense—as well as settlements and judgments—from the policy limits.

To address these concerns, the Rhode Island Legislature enacted the statute at issue in this case. Patterned after the 1955 version of the Uniform Contribution Among Tortfeasors Act, as well as the settlement and contribution provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9613(f)(2), the statute provides that any defendant resolving its liability to DEPCO "in a judicially-approved good faith settlement shall not be liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement." *See* Pet. App. 5a (setting out full text of Act). The law further states that "[s]uch settlement does not discharge any other joint tortfeasors unless its terms so provide," but it expressly establishes a credit against "the potential liability of such joint tortfeasors by the amount of the settlement."

The statute thus allows a settling defendant to resolve its liability once and for all. Its effect on non-settling defendants is two-fold: on the one hand, it eliminates

---

many of its insureds, as among the parties deserving special mention." Pet. App. 4a.

the opportunity to seek contribution from a settling defendant, while, on the other, it reduces the potential liability of a non-settling defendant by the full amount of the settlement. *See* Pet. App. 5a.

b. Petitioner—a defendant in a suit brought by DEPCO and a third-party defendant in other suits brought by DEPCO—initially challenged the statute in federal court, seeking a declaratory judgment that it violated a variety of constitutional provisions. The district court held that the challenge was not ripe and that, in any event, abstention was appropriate. *See Ernst & Young v. Depositors Economic Protection Corp.*, 862 F. Supp. 709 (D.R.I. 1994). The court of appeals affirmed. *See Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d at 535-41.

The present action involves a suit brought by DEPCO against certain former officials of the Brown University Employees Credit Union (the Brown defendants), an institution insured by RISDIC. The suit alleges that defendants' negligence resulted in the failure of the institution and, ultimately, in damage to DEPCO. Defendants filed a third-party complaint for contribution and indemnity against petitioner and certain of its present and former partners. *See* Pet. App. 2a.

The constitutional challenges to the Act came before the state Supreme Court on two separate paths. First, the Governor of the State requested a written opinion from the Court with respect to three questions, including whether the provisions of the Act "violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[4] Second, the Brown defendants asked the trial court to certify largely the same

[4] The full text of the questions is set forth in the opinion of the Supreme Court of Rhode Island at Pet. App. 1a-2a.

questions to the Supreme Court.[5] Three days later, DEPCO filed a similar motion, as well as a motion seeking approval of a settlement between itself and the Brown defendants. Pet. App. 2a-3a. The settlement was expressly conditioned on the Act being held constitutional. Pet. App. 24a.

The trial court then undertook to determine whether the settlement met the standards of the Act. As part of its inquiry, it gave petitioner the opportunity to address the terms of the settlement, to which petitioner was not a party, in both written and oral submissions. Petitioner took advantage of the opportunity, filing a brief with the court and offering argument at the hearing to evaluate the settlement.[6] Ultimately, the trial court approved the settlement, finding it to be "fair and reasonable, made in good faith, and . . . in the best interests of the moving parties and the receivership estates." Pet. App. 26a. The Supreme Court, in a separate appeal, affirmed. *Rhode Island Depositors Economic Protection Corp. v. Brown*, 661 A.2d 969 (R.I. 1995).

Petitioner also continued, in somewhat roundabout fashion, its effort to have the Act declared unconstitutional. Although its principal argument was that the Supreme Court should *not* decide the constitutional issues presented to it, it argued, in the alternative, that the law violated the equal protection clause, the due process clause, the bill of attainder clause, and the contract clause. Rejecting the contention that the issues were not suitable for its decision, the Supreme Court elected to address

---

[5] The only difference was that the certified questions also requested an opinion with respect to whether the statute violated the contract clause. See Pet. App. 26a-27a.

[6] Petitioner "had also received massive discovery from representatives of Rhode Island Depositors Economic Protection Corporation (DEPCO) and the receiver of Brown Union and other credit unions incident to litigation filed by DEPCO and the receiver against Ernst & Young in 1992." *Rhode Island Depositors Economic Protection Corp. v. Brown*, 661 A.2d 969, 970 (R.I. 1995).

them "in the form of an opinion," stating that its "findings shall therefore be legally binding." Pet. App. 3a. On the merits, it rejected petitioner's constitutional arguments across-the-board.

Turning first to the equal protection arguments, the Court noted that the Act was "an example of economic legislation entitled to rational basis review." Pet. App. 7a. The Court then determined that the law readily met that standard. Looking to the state interest in promoting good-faith settlements, the Court observed in particular that the insurance policies covering defendants in this type of litigation deducted the costs of defense from the policy limits, "thereby reducing the amount of insurance coverage available to pay settlements or satisfy judgments." Pet. App. 9a. It was thus "persuaded that encouraging payment of insurance proceeds to DEPCO in the form of settlements, instead of allowing them to be dissipated through payment of costs of defense of protracted litigation, is certainly a legitimate legislative objective." Pet. App. 9a.

The Court reached a similar conclusion in rejecting arguments based on the due process clause. Recognizing the two-part rational basis test applied by this Court to retroactive legislation, *see* Pet. App. 10a-11a (citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)),[7] the Court found that the Act met this standard as well as an apparently stricter standard applied under state law.[8] In so doing, the Court

---

[7] Although DEPCO took the position that the statute was prospective in nature—arguing that a claim for contribution arises only when a joint tortfeasor actually pays a disproportionate share of liability—the Supreme Court disagreed, holding that the claim arises at the time of the underlying tort. Pet. App. 12a. It thus concluded that the Act "has a retroactive effect." Pet. App. 12a.

[8] Under state law, "the purpose of a [retroactive] statute must be such that, on balance, outweighs the unfairness of retroactivity." Pet. App. 11a (citing *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 870 (R.I. 1987); *Raymond v. Jenard*, 120 R.I. 634, 639, 390 A.2d 358, 360 (1978)). It appears that, pursuant to this test, a

explicitly dismissed the notion that petitioner had somehow relied on the earlier statute in conducting its affairs, finding it "highly unlikely that a sophisticated accounting firm would rely upon speculative joint tortfeasor contribution in deciding to perform negligent acts." Pet. App. 14a. The Court further "agree[d] that facilitating settlement of the DEPCO litigation in light of the depletion of the credit union insurance policies would ultimately relieve to some extent the taxpayers' cost of the bailout." Pet. App. 15a. Even under the possibly less forgiving state test, the Court viewed that interest as sufficient to sustain the statute against due process attack.[9]

The Court also concluded that the law was not a bill of attainder and that it did not violate the contract clause. Addressing the first question, the Court stated that, "[g]iven the DEPCO Act's goal of encouraging settlements and saving the amount and cost of litigation, the statute could reasonably be said to further non-punitive legislative purposes." Pet. App. 18a. The Court found no merit in arguments that the Act was intended to punish petitioner in particular, remarking that "[n]either the Legislature nor this court could accurately predict whether the DEPCO Act will work to the advantage or disadvantage of Ernst & Young or any other party. Consequently no punitive motive can be discerned." Pet. App. 18a.[10]

---

retroactive statute might be held invalid even when it satisfies the rational basis test, if the court regarded the potential unfairness as too severe.

[9] Petitioner also raised a procedural due process claim, contending that it was denied its right to be heard on the merits of the settlement between DEPCO and the Brown defendants. The Supreme Court rejected this argument without comment.

[10] As the Court observed, "[t]he burden thrust upon Ernst & Young by the DEPCO Act is choosing whether to settle the case, or continue its defense, with the potential of increased exposure if DEPCO enters into settlement agreements with other joint tortfeasors. The burden faced by Ernst & Young is no different from the burden faced by other defendants in DEPCO suits." Pet. App. 19a.

Addressing the contract clause question, the Court—after saying that it saw "no contractual right that is impaired by this legislation" (Pet. App. 20a)—determined that the law was, in any event, constitutional. Again pointing to the "legitimate purpose of returning funds to the public," the Court found that "the DEPCO Act is not a law impairing the obligation of contracts . . . ." Pet. App. 20a.

DISCUSSION

This case does not warrant further review. With respect to the substantive due process argument—*i.e.*, that the statute deprived petitioner of a preexisting right to seek contribution—petitioner does not even contend that the Court below applied an erroneous standard to judge the constitutionality of the Act; rather, it offers only the garden-variety complaint that the Court wrongly applied the correct standard to this particular legislation. That issue would not justify a grant of certiorari even if the assertion were correct—which, in any event, it is not. As the Rhode Island Supreme Court correctly noted, the statute protecting settling defendants from suits for contribution, while providing non-settling defendants with a dollar-for-dollar offset against any eventual liability, serves the entirely legitimate, reasonable goal of facilitating settlement in an important, interrelated class of cases. Although petitioner urges this Court to second-guess that legislative judgment, nothing in the due process clause provides any basis for doing so. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984).

The procedural due process issue raised by petitioner—*i.e.*, that Rhode Island law denied it the right to be heard about the terms of settlement with joint tortfeasors—fares no better. In the first place, petitioner cannot plausibly demonstrate that Rhode Island has a rule barring it from being heard. The Court below did not say so, and petitioner's efforts to make such a holding out of

judicial silence are unavailing. Furthermore, the record here shows unequivocally that petitioner *was* given the opportunity to file briefs about the settlement with the Brown defendants and further given the opportunity to speak at the hearing to consider the settlement, both of which petitioner fully embraced. As the cases cited by petitioner themselves demonstrate, due process requires no more.

1. a. This Court has set forth, on numerous occasions, the basic standard for determining whether retroactive legislation comports with the due process clause. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018, 2022 (1994); *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1112 (1992); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976).[11] That standard is, in effect, a two-part rational basis test: " '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 112 S. Ct. at 1112 (quoting *Pension Benefit Guaranty Corp.*, 467 U.S. at 730). The Court has also emphasized that, so long as "retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . ." *Pension Benefit Guaranty Corp.*, 467 U.S. at 729-30; *see also United States v. Carlton*, 114 S. Ct. at 2022. Just two Terms ago, in fact, the Court observed that "the *constitutional* impediments to retroactive civil legislation are now modest . . . ." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994).

---

[11] Because we believe that the petition should be denied in any event, we accept for purposes of this brief that the statute does operate retroactively.

Petitioner does not quarrel with the governing standard. Nor does it contend that the Rhode Island Supreme Court ignored it in favor of some other standard permitting more deferential scrutiny.[12] Its principal argument, therefore, is nothing more than an assertion that this particular statute lacks a rational basis. Even if there were merit in this argument, it would not make the case worthy of further review. But, in fact, the argument has no merit at all.

The crux of the argument is simply that the Rhode Island Legislature erred in concluding that the law would facilitate settlement of claims. *See* Pet. 13-15. As the Court below observed, however, the view taken by the legislature is perfectly rational. *See* Pet. App. 9a-10a, 15a-16a. The statute is not some aberration invented by the Rhode Island Legislature; rather, it is patterned after the 1955 version of the Uniform Contribution Among Tortfeasors Act, which has been adopted in 19 States. And that version was expressly premised on the belief that prior law—the version that applies generally in Rhode Island and that petitioner prefers—"discourage[d] settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file." Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 63 (Commissioner's Comments to § 4) (1955).[13]

---

[12] As we have noted, *see* note 8 *supra*, the state standard appears *stricter* than the standard applied by this Court, allowing for invalidation of a statute simply because it results in too much "unfairness." Pet. App. 13a-16a. For good reason, *see* pages 13-14 *infra*, the Court below found no such unfairness here.

[13] As the comments to the Act pointed out, plaintiffs' attorneys were unwilling to release other (nonsettling) tortfeasors "to the extent of the pro rata share of the released tortfeasor," for the simple reason that "they have no way of knowing what they were giving up." Commissioner's Comments to § 4 (internal quotation marks omitted). That is precisely the dilemma faced by DEPCO in trying to settle cases arising out of the Rhode Island financial crisis.

The need to facilitate settlements is all the more apparent in the circumstances presented here. Having repaid depositors, DEPCO is now put in the position of seeking recovery from the individuals and institutions responsible for the financial crisis in the first place. There is, however, a practical problem in prosecuting these suits: because defendants are routinely covered by "wasting-asset" insurance policies—under which the costs of defense are deducted from the policy limits—the effect of protracted litigation is necessarily to "reduc[e] the amount of insurance coverage available to pay settlements or satisfy judgments." Pet. App. 9a. The solution adopted by the legislature is eminently sensible: to remove obstacles to potential settlements, allowing scarce funds to be directed toward repayment of obligations rather than consumed in adversarial proceedings. And, given that the cases all arise out of conduct occurring a number of years ago, the legislature, to make the law serve its purpose, had to make it applicable to suits involving that conduct.

Petitioner cannot seriously dispute the fact that, in this class of cases, the generally-applicable contribution rules were impeding settlement. What petitioner offers, instead, is its own solution to the problem: that DEPCO should simply grant "proportionate fault releases" to all settling defendants. *See* Pet. 15. But petitioner does not explain why DEPCO—which has undertaken to reimburse depositors injured by the joint tortfeasors—should be put at risk of insufficient recovery in order that those engaged in negligence and other malfeasance may have a ceiling on their liability. *See* note 13 *supra*. A State *could* make that choice, of course, but it is an odd proposition that a State *must* do so to be in compliance with the due process clause.

Petitioner contends, however, that the decision of this Court in *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994), shows that the rule adopted by the legislature is irrational. Pet. 13-14. This is wishful thinking. In *McDermott*, this Court merely concluded that, in ad-

miralty cases, the "proportionate share" rule (the rule generally applicable in Rhode Island) is preferable to the *pro tanto* offset rule (the rule established by the legislation here at issue). To state the obvious, that holding does *not* mean that a decision to follow the *pro tanto* rule generally, or in any particular class of cases, would be *ipso facto* unreasonable.[14] Indeed, the opinion indicates just the opposite: after dismissing a third rule as "clearly inferior" (114 S. Ct. at 1467), the Court declared the choice between the remaining two rules to be "less clear" (*id.* at 1467), pointing out that the effect of the respective rules on settlements and judicial economy was "ambiguous." *Id.* at 1468, 1469.

Finally, the fact that DEPCO is a party to the litigation—and thus might gain some advantage from additional settlements—does not make the statute unconstitutional. To begin with, the principal thrust of the law is to adjust potential liability among the various tortfeasors themselves, not among DEPCO and the defendants. And, in any event, it is hardly uncommon for provisions in retroactive legislation to provide financial benefits to the enacting government or to relieve it of potential obligations. *See, e.g., Pension Benefit Guaranty Corp.*, 467 U.S. at 720-22 (statute protecting PBGC, a Government corporation, against expanded obligations); *see also Turner Elkhorn*, 428 U.S. at 8-12 (statute increasing employer, rather than government, liability). Indeed, that is always the case with respect to retroactive tax legislation, which has routinely been upheld by this Court. *See, e.g., United States v. Carlton*; *United States v. Hemme*, 476 U.S. 558 (1986); *United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S. 134 (1938).

b. Having no real legal argument to stand on, petitioner goes to considerable lengths to portray itself as the victim of unfair legislation. *See* Pet. 6-7, 15-18. This

---

[14] For example, Congress has adopted the *pro tanto* offset rule in cases arising under CERCLA. *See* 42 U.S.C. § 9613(f)(2).

sort of complaint is hardly novel: given that retroactive legislation by definition changes law after-the-fact, allegations of unfair treatment are part and parcel of due process challenges. But the due process clause does not guarantee the *status quo*. As this Court has made clear, " 'legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.' " *Pension Benefit Guaranty Corp.*, 467 U.S. at 729 (quoting *Turner Elkhorn*, 428 U.S. at 16); *see also Carlton*, 114 S. Ct. at 2023 (noting that, while taxpayer concededly relied on an earlier version of federal tax law, "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code").

The claim of unfairness in this case, moreover, is extraordinarily feeble. For example, petitioner cannot convincingly maintain that it would have altered its primary conduct if it had known of the new rule at the time. Although it has claimed that it considered risks, including litigation risks, in deciding whether to accept employment with RISDIC and various credit unions, the Supreme Court properly gave short shrift to those representations, finding them "less than persuasive." Pet. App. 14a. As the Court pointedly stated, "[i]t is highly unlikely that a sophisticated accounting firm would rely upon speculative joint tortfeasor contribution in deciding to perform negligent acts." Pet. App. 14a.

It is also important to recognize that the provisions of the law may actually work to the *benefit* of defendants like petitioner, in at least two ways. First, as the facts in *McDermott* demonstrate, the *pro tanto* rule may turn out to be *more* favorable to particular non-settling defendants. *See* 114 S. Ct. at 1463-64 (non-settling defendant sought application of *pro tanto* offset rule in order to achieve *greater* reduction of liability). And, even if that were not so, the statute allows *any* tortfeasor, including petitioner, to seek the potential advantages of negotiating a settlement and fixing its liability at an established amount. *See* Pet. App. 18a-19a ("[n]either the Legislature nor

this court could accurately predict whether the DEPCO Act will work to the advantage or disadvantage of Ernst & Young or any other party").[15]

Finally, petitioner paints an unduly rosy picture of what its situation would have been under the alternative rule of contribution. Given that DEPCO would be free to collect the full amount of any judgment against petitioner, under recognized principles of joint and several liability applicable in Rhode Island, petitioner would be left with the subsequent task of pursuing claims of contribution against other tortfeasors. In the process, however, it would face precisely the same problem identified by the Court below: that, under the "wasting asset" policies held by other defendants, the costs of litigation would eat away at the funds available to pay settlements or satisfy judgments. Under those circumstances, petitioner (if found liable) might, as a practical matter, bear far more responsibility than under the present rule. This is not a case, therefore, where claims of "unfairness" have any real grounding in fact. *Compare Carlton*, 114 S. Ct. at 2023 (upholding statute even though taxpayer had relied to its detriment on prior, clearly more favorable law).

c. Petitioner also asserts that the decision below is in conflict with a decision of the Supreme Court of Virginia, *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984). *See* Pet. 18-19. This assertion, even taken at face value, would not justify review here: the existence of a single contrary state-court decision, issued more than 11 years ago, simply does not demonstrate a conflict of

---

[15] Although petitioner argues that it "was the party 'targeted' by the Act," (Pet. 7)—a theory largely resting on an affidavit of its own associate general counsel—the Court below necessarily and properly rejected that argument, pointing out that, by the terms of the Act, "[t]he burden faced by Ernst & Young is no different from the burden faced by other defendants in DEPCO suits." Pet. App. 19a. *See also* DEPCO Reply Brief (R.I.S.Ct.) at 11-13 (refuting petitioner's assertions).

such immediacy and importance as to call for the attention of this Court. Furthermore, there is less to this supposed conflict than meets the eye.

It is, at the very least, debatable whether the decision in *Shiflet* actually rests upon the federal due process clause.[16] But two things about the decision are not debatable. First, there was no need for the Virginia court to invoke principles of due process because, as the court made plain, state law prohibits retroactive application of a statute adversely affecting substantive rights. *See* 228 Va. at 120, 319 S.E.2d at 753-54. Any resort to the due process clause, therefore, was wholly gratuitous. Second, and equally important, the Virginia court did not even refer to, much less attempt to apply, the standard set forth in *Turner Elkhorn*—and reiterated three months earlier in *Pension Benefit Guaranty Corp.*—for evaluating challenges to retroactive legislation under the due process clause. By contrast, the Court below acknowledged that standard and applied, if anything, an even more exacting standard to the legislation at issue here. The decision in *Shiflet*, therefore, provides no sound basis for questioning the judgment in this case.

2. Petitioner also makes a procedural due process argument, asserting that it was denied its right to "meaningful participation" in settlement proceedings involving other parties. *See* Pet. 19-23. According to petitioner,

---

[16] Although the Virginia court did say that "retroactive application of the enactment would violate Eller's due process rights and would be invalid," 228 Va. at 121, 319 S.E.2d at 754, the two state cases cited in support of that declaration are decisions turning on issues of statutory construction. *See Duffy v. Hartsock*, 187 Va. 406, 421, 46 S.E.2d 570, 577 (1948) ("[w]e therefore conclude that the legislature, by express language, made manifest its intent that such amendments should apply as well to judgments theretofore rendered as to those thereafter obtained"); *Strickland v. Simpkins*, 221 Va. 730, 734, 273 S.E.2d 539, 541 (1981) ("[w]e do not believe that the legislature could have expressed its intention in clearer language").

this denial creates a conflict with decisions in the Second and Fourth Circuits recognizing that right. *See In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1031 (2d Cir. 1992); *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 160 n.3 (4th Cir. 1991). Assuming that this argument was properly preserved in state court,[17] it is nonetheless without merit: petitioner *was* allowed to participate in settlement proceedings involving other parties, and its claims of conflict are thus imaginary.

The Supreme Court of Rhode Island did not hold—either explicitly or implicitly—that a non-settling defendant has no right to be heard with regard to settlements involving joint tortfeasors. Although petitioner tries to put that face on the Court's (silent) refusal to accept its argument, a far more likely reason is the fact that petitioner *did* participate in the proceedings to assess the settlement between DEPCO and the Brown defendants. Petitioner was given (and accepted) the opportunity to file a brief addressing the merits of the settlement, and it was given (and accepted) the opportunity to present argument about the settlement before the court. The cases cited by petitioner call for nothing more.

Non-settling defendants, of course, may seek to diminish the attractiveness of settlement for other tortfeasors by making review of the settlement as burdensome as possible. But the right to be heard does not carry with it a corollary right to turn settlement hearings into the sort of extended litigation that settlement is meant to avoid. Thus, quite apart from the fact that petitioner had already enjoyed substantial discovery (*see* note 6 *supra*), it is not a violation of due process for a trial court, charged with evaluating the good faith of a settlement, to exercise

---

[17] Although petitioner addressed this issue in the state Supreme Court, its presentation before the superior court consisted, at most, of one or two passing references in its brief. It is open to fair question whether this treatment was adequate to preserve the issue for appeal. *See Vigneau v. LaSalle*, 111 R.I. 183, 300 A.2d 642 (R.I. 1973).

its discretion in order to assure that non-settling parties, while being heard, do not alter the nature of the proceedings. Here, the courts below considered petitioner's arguments and nonetheless concluded that the settlement was fair and made in good faith. Petitioner may continue to believe that the settlement should not have been approved, but that grievance is not of constitutional dimension.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD DECOF
JOHN S. FOLEY
HOWARD B. KLEIN
DECOF & GRIMM
One Smith Hill
Providence, RI 02903
(401) 272-1110

H. BARTOW FARR, III *
FARR & TARANTO
2445 M Street, NW
Suite 225
Washington, DC 20037
(202) 775-0184

* Counsel of Record

Dated: October 13, 1995

(3)

Supreme Court, U.S.
FILED
OCT 16 1995
CLERK

No. 95-445

IN THE
Supreme Court of the United States

October Term, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, ET ALS.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF OF THE FORMER DIRECTORS OF BROWN UNIVERSITY EMPLOYEES CREDIT UNION IN OPPOSITION

JAMES E. CARROLL
Counsel of Record
SHELIA HIGH KING
KIRSTEN M. LACOVARA
PEABODY & ARNOLD
One Citizens Plaza, Suite 840
Providence, RI 02903
(401) 831-8330

Attorneys for Respondents

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

25 pp

QUESTIONS PRESENTED

1. Whether the court below properly held that a retroactive state statute does not offend the Due Process Clause of the Fourteenth Amendment, where (a) the statute was enacted subsequent to a banking crisis which affected the public welfare and gave rise to an avalanche of lawsuits against more than 100 alleged tortfeasors who may have contributed to the crisis; (b) the statute was enacted for the legitimate public purpose of facilitating settlement of the lawsuits in order to minimize state taxpayers' liability for the depositor bailout; (c) that legitimate public purpose is furthered by the statute's alteration of a non-settling joint tortfeasors' right to seek contribution from settling parties to induce alleged tortfeasors to seek finality of litigation; and (d) every alleged tortfeasor to whom the statute may apply has equal opportunity to gain the benefit of the statute and avoid its potential harshness.

2. Whether the court below properly held that Ernst & Young was afforded due process when Ernst & Young had (a) notice and an opportunity to be heard in the state legislature prior to the enactment of the retroactive statute and (b) notice and an opportunity to be heard in the state court in the settlement approval hearings.

PARTIES TO THE PROCEEDINGS

Petitioner Ernst & Young LLP was a third-party defendant in the proceeding below. Edward T. Broadmeadow, Alfred J. Corso, Larry D. Davidson, Stephen B. Forman, Robert R. Fournier, Geoffrey B. Hopper, Keith R. Phillips, and Michael A. Rizzo -- all present or former partners or employees of Ernst & Young LLP -- were also third-party defendants below.

Respondents Rhode Island Depositors Economic Protection Corporation and Edward D. Pare, Jr., Receiver of Brown University Employees Credit Union, were plaintiffs below.

Respondents Wilhelmina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Marisi Viau, John Doe and Jane Doe -- all former directors of Brown University Employees Credit Union -- were defendants and third-party plaintiffs below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 7

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS CORRECT BECAUSE THE RETROACTIVE OPERATION OF THE ACT FURTHERS A LEGITIMATE GOVERNMENTAL PURPOSE OF FACILITATING SETTLEMENT OF THE VAST AND COMPLEX LITIGATION ARISING OUT OF THE STATE'S CREDIT UNION CRISIS 8

TABLE OF CONTENTS - Continued

Page

A. The Act Comports With The Requirements of Due Process 8

1. A Legitimate Public Purpose Furthered By Rational Means Justifies The Act 8

2. The Act Does Not Constitute Arbitrary And Unreasonable Governmental Action 10

B. The Strong Incentive For Settlement Created By Affording Settling Alleged Joint Tortfeasors Contribution Protection And Posing The Prospect Of Non-Settling Joint Tortfeasors Paying More Than Their Proportionate Share Of Liability Justifies The Retrospective Operation Of The Act 11

II. THE ALLEGED CONFLICT BETWEEN THE DECISION BELOW AND THAT OF THE VIRGINIA COURT IN *SHIFLET* IS PROSPECTIVE AND DOES NOT JUSTIFY FURTHER REVIEW 14

III. ERNST & YOUNG HAS HAD AMPLE OPPORTUNITY TO BE HEARD 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases:

Day-Bright Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 9

Ernst & Young LLP v. Depositors Economic Protection Corp., 45 F.3d 530 (1st Cir. 1995) 6

General Motors Corp. v. Romein, 503 U.S. 181 (1992) 8

Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) 15

Grannis v. Ordean, 234 U.S. 385 (1914) 16

In re Jiffy Lube Securities Litig., 927 F.2d 155 (4th Cir. 1991) 15, 16

Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994) 8

In re Master Mates & Pilots Pension Plan, 957 F.2d 1020 (2nd Cir. 1992) 15

McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994) 10, 11

Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456 (1981) 9

TABLE OF AUTHORITIES - Continued

Page

Cases:

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 16

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 8, 9, 10

Rhode Island Depositors Economic Protection Corp. v. Brown (In Re: Advisory Opinion to the Governor), 659 A.2d 95 (R.I. 1995) . . . . . *passim*

Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984) 14

Smithfield Concerned Citizens v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990) 10

TGB, Inc. v. Bendis, 36 F.3d 916 (10th Cir. 1994) . . . 13

United States v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990) 12

United States v. Carlton, 114 S. Ct. 2018 (1994) 8, 9, 10

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 8, 12

TABLE OF AUTHORITIES - Continued

Page

Constitutional Provisions:

U.S. Const. amend. XIV, § 1 . . . . . *passim*

R.I. Constitution, art. 10, § 3 2

Statutes:

28 U.S.C. § 1257(a) 2

R.I. Gen. Laws § 9-24-27 (1993) 2

R.I. Gen. Laws § 42-116-12(i) (1993) 3, 4

R.I. Gen Laws § 42-116-40 . . . . . *passim*

No. 95-445

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et als.*
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF OF THE FORMER DIRECTORS OF BROWN UNIVERSITY EMPLOYEES CREDIT UNION IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondents Wilhelmina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Marisi Viau, John Doe and Jane Doe, the former Directors of Brown University Employees Credit Union (the "Brown Directors"), respectfully

request that this Court deny the Petition for Writ of Certiorari submitted by Ernst & Young LLP.

OPINIONS BELOW

On May 19, 1995 the Rhode Island Supreme Court answered questions transmitted by the state Governor and those certified by the Superior Court Justice on the constitutionality of a state statute, in the negative and held that the state statute is constitutional. The Rhode Island Supreme Court Opinion is reported at 659 A.2d 95 and is reproduced in the Appendix to Ernst & Young LLP's Petition for Certiorari (hereinafter referred to as "App.") (App.1a.). The opinion and the order of the Superior Court certifying the questions are unreported; however, the opinion and order are reproduced in the Appendix to Ernst & Young LLP's Petition for Certiorari. (App.21a, 26a.)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The jurisdiction of the Rhode Island Supreme Court was invoked pursuant to Article 10, Section 3 of the Rhode Island Constitution and R.I. Gen. Laws 1956 (1993 Reenactment) § 9-24-27.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions cited by the Petitioner, the Brown Directors submit the following to this Court:

Section 42-116-12(i) of the Rhode Island General Laws provides in relevant part:

> (1) All net proceeds of litigation, (after payment of all legal fees, costs and expenses arising in connection therewith) whether by settlement or suit, prosecuted by an eligible institution, the receiver of an eligible institution and/or the corporation, shall be paid to the corporation and shall be utilized as follows:
> (i) To pay the guaranteed balances in accordance with subsection (e)(3); and
> (ii) After the guaranteed balances have been paid in full, to pay the loan obligations or bond indebtedness of the corporation.
> (2) The term "litigation," for purposes of this subsection shall mean all rights, claims and causes of action against:
> (i) Any eligible institution;
> (ii) The Rhode Island Share and Deposit Indemnity Corporation;
> (iii) And/or any officers, directors, employees, accountants, attorneys, appraisers, consultants, agents, or providers of professional services to the institution and/or the Rhode Island Share and Deposit Indemnity Corporation.

STATEMENT OF THE CASE

In 1991, the Rhode Island General Assembly enacted emergency legislation establishing respondent Rhode Island Depositors Economic Protection Corporation ("DEPCO"), a public corporation, in response to the collapse of the private deposit and indemnity insurer of 45 credit unions and financial institutions. (App.3a.) Funded by the Rhode Island taxpayers,

DEPCO was created to bail-out thousands of depositors whose funds had been frozen on January 1, 1991 when the then Governor of Rhode Island proclaimed a banking emergency and ordered the closing of the insolvent Rhode Island Share and Deposit Indemnity Corporation ("RISDIC") and the institutions it insured, including the not-for-profit Brown University Employees Credit Union ("Brown"). (App.3a.) In addition, the comprehensive scheme of the DEPCO legislation created a new receivership law for credit unions and financial institutions; obligated DEPCO to liquidate the assets of RISDIC and fourteen credit unions and financial institutions which did not reopen; and authorized DEPCO to pursue claims against alleged tortfeasors who contributed to the banking crisis. (App.3a.) The legislation mandated DEPCO to repay deposits, loan obligations and bond indebtedness from the net proceeds of litigation. *See* R.I. Gen. Laws § 42-116-12(i).

Armed with statutory authority, DEPCO asserted a variety of claims against a plethora of borrowers and former officers, directors and staff of RISDIC and the closed credit unions (including the Brown Directors) as well as against numerous professionals who had rendered expert services to RISDIC and the credit unions including, but not limited to, accountants such as Ernst & Young LLP ("Ernst & Young"). (App.4a, 23a.) Additionally, depositors filed over 170 complaints in the state court against the various directors, officers and staff of the closed institutions. On February 20, 1992, DEPCO, the permanent receivers of each of the closed institutions and other plaintiffs, filed a complaint against Ernst & Young in state court alleging negligence, breach of contract and negligent misrepresentation. The banking crisis spawned an ocean of lawsuits. (App.4a.) DEPCO opened settlement discussions and subsequently made demands on alleged joint tortfeasors in an attempt to collect its alleged damages.

In the ensuing months and years, DEPCO's settlement demands were spurned by the alleged tortfeasors because DEPCO would not agree to provide unlimited indemnification to those who were likely to be sued for contribution. In 1993, the Rhode Island General Assembly amended the DEPCO statutory scheme with a retroactive[1] statute (the "Act") designed to facilitate and promote settlement of the DEPCO claims against alleged tortfeasors by affording contribution protection to persons who resolve their liability with DEPCO in a judicially-approved good faith settlement. (App.4a, 5a.) Under the Act, a non-settling joint tortfeasor is liable for the full judgment amount of damages awarded against such tortfeasor less a *pro tanto* reduction equivalent to the settlement amount. In effect, the Act encourages settlements by (1) giving the alleged joint tortfeasors that settle first an opportunity to settle for less than the full amount of their potential joint liability without the risk of lawsuits from non-settling parties for contribution and (2) exposing non-settling joint tortfeasors to the possibility of bearing a disproportionate share of liability.

Less than a month following the Act's enactment, Ernst & Young filed a declaratory judgment action in the Federal District Court for the District of Rhode Island seeking a declaration that the Act is unconstitutional. (App.5a.) Ernst & Young appealed from the District Court's dismissal of the complaint on ripeness

---

[1] The Brown Directors argued below that the Act does not operate in a retroactive manner because the Act has a prospective affect on inchoate contribution claims; the statute does not increase any person's liability (inasmuch as there is joint and several liability) and the statute imposed no new duties on any person. *See* Brief of Certain Former Brown Directors and Officers of Brown University Employees Credit Union as Proponents of the Constitutionality of Rhode Island General Laws § 42-116-40 at 13-14. The Rhode Island Supreme Court rejected this argument. (App.12a.)

and abstention grounds, and the United States Court of Appeals for the First Circuit affirmed noting that in order for Ernst & Young to be harmed by the operation of the Act, among other things, Ernst & Young must be found to have been negligent; its negligence must be found to have caused or contributed to the damages; a court must find it liable for an amount greater than Ernst & Young's ratable share of the damages and order Ernst & Young to pay the same, *Ernst & Young LLP v. Depositors Economic Protection Corp.*, 45 F.3d 530, 538 n.11 (1st Cir. 1995).

On September 29, 1994, more than a year after the passage of the Act, DEPCO filed a complaint against the Brown Directors in state court. The Brown Directors answered the complaint, denied DEPCO's allegations and asserted their affirmative defenses. The Brown Directors filed a third-party complaint against Ernst & Young and certain of its current and former partners. On October 14, 1995, the Brown Directors moved the state court to certify questions of the Act's constitutionality to the state Supreme Court. On October 17, 1994, DEPCO moved for approval of a settlement between it, the Permanent Receiver for Brown University Employees Credit Union and the Brown Directors. (App. 2a.) On the same date, DEPCO moved to certify questions, as well. (App.2a.) The Superior Court overruled Ernst & Young's objections (App.22a, 24a); approved the settlement (App.25a, 26a, 27a); and granted the motion to certify the questions (App.25a, 26a, 27a). In a separate proceeding, the Governor of Rhode Island requested an advisory opinion pursuant to Rhode Island law on the Act's constitutionality. (App.2a, 3a, 26a, 27a.) The state Supreme Court consolidated the proceedings and after entertaining full briefing and hearing oral argument, responded to the consolidated matters upholding the constitutionality of the Act in

the opinion from which Ernst & Young seeks review. (App.2a, 3a.)

REASONS FOR DENYING THE PETITION

The opinion below does not warrant review. The Rhode Island Supreme Court held that the retroactive operation of the challenged Act does not offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution because (1) a rational basis exists for the Act--the promotion of settlement which permits the cost efficient and expeditious collection of damages from alleged tortfeasors to reimburse DEPCO and the Rhode Island fisc for the depositor bailout before funds available to pay damages under defense-within-limits insurance policies are depleted; and (2) a legitimate public purpose is furthered by affording settling alleged joint tortfeasors protection from contribution claims by non-settling joint tortfeasors who risk the burden or benefit of a *pro tanto* set-off of their adjudged liability by the settlement amount.

Ernst & Young's sally that Rhode Island "rigged the rules" against it by passing the Act is the unfortunate remnant of petitioner's bias. Such a conclusion ignores the magnitude of the fiscal crisis that engulfed the state when the credit unions closed and the flood of litigation that ensued. The Rhode Island General Assembly's informed decision to fashion a remedy that would facilitate settlement of hundreds of lawsuits with all of the alleged tortfeasors involved in the credit union litigation belies any assertion of an improper motive of targeting the petitioner. Petitioner is just one of many alleged tortfeasors sued in hundreds of cases. Petitioner's decision not to settle and gain the benefit of the Act gives it a way to complain the loudest. After five years of litigation, it seems that is all the petitioner has left.

The Act does not violate principles of due process because it furthers the rational goal of encouraging settlement of the multitude of lawsuits arising out of the RISDIC and credit union closings. The principles of due process are easily satisfied and the impediments to retroactive economic legislation are easily overcome because the legislation is rationally related to a legitimate purpose. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994).

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS CORRECT BECAUSE THE RETROACTIVE OPERATION OF THE ACT FURTHERS A LEGITIMATE GOVERNMENTAL PURPOSE OF FACILITATING SETTLEMENT OF THE VAST AND COMPLEX LITIGATION ARISING OUT OF THE STATE'S CREDIT UNION CRISIS.

A. The Act Comports With The Requirements Of Due Process.

1. A Legitimate Public Purpose Furthered By Rational Means Justifies The Act.

Although this Court has repeatedly articulated the rule that the retroactive operation of a statute fully supported by a legitimate purpose and rational means comports with due process, *see, e.g.*, *United States v. Carlton*, 114 S. Ct. 2018, 2022 (1994); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976), Ernst & Young petitions this Court for certiorari review of the decision below in which the state court applied appropriately the rational basis and relationship test to the challenged Act. That test is the same

standard that is applied to prospective legislation. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 733.

Ernst & Young would have this Court substitute its judgment for the wisdom of the Rhode Island General Assembly because it would like to unravel a settlement induced by the Act. However, the Act satisfies the test for due process of law under the Fourteenth Amendment and therefore, "judgments about the wisdom of such legislation remain within the province of the legislature." *United States v. Carlton*, 114 S. Ct. at 2022 *quoting Pension Benefit Guaranty Corp. v. R.A. Gray*, 467 U.S. at 730. Courts do not sit to decide whether the policy the legislature expresses offends the public welfare. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

The Rhode Island Supreme Court found the Act bears a rational relationship to the legitimate state purpose of encouraging settlements with the defendants in the RISIDC-related tort cases so as to avoid the depletion of the "defense-within-limits" or "wasting-assets" insurance coverage available to pay settlements or satisfy judgments and thereby minimize the taxpayers burden for the depositor bailout.[2] App.9a, 9b, 15a. This purpose justifies the retroactive application of the Act.

---

[2] The court below first held that the Act is "rationally related to legitimate public purposes" and therefore does not violate the Equal Protection Clause under the state and federal constitutions. The court then considered whether the Act is violative of due process. It followed *a fortiorari* from the court's conclusion that the Act bears a rational relation to legitimate governmental purposes that the Act would be sustained under the Due Process Clause of the Fourteenth Amendment. *See Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 470 n.12 (1981).

2. The Act Does Not Constitute Arbitrary And Unreasonable Governmental Action.

The *pro tanto* scheme the Act employs is rational, logical and effective. Only a showing that the legislature had acted in an arbitrary and irrational way could imperil otherwise valid economic legislation under the due process clause. *Pension Benefit Guaranty Corp. v. R.A. Gray*, 467 U.S. at 730. Perhaps, the unpersuasiveness of its own argument motivates Ernst & Young to contort federal case law to question the Act's rationality.

Despite Ernst & Young's inference otherwise, the Court's validation of the retroactive statute in *United States v. Carlton*, 114 S. Ct. 2018 (1994), does not hinge on Congress's motive on passing the statute involved in that case. This Court will not look behind retroactive legislation to infer an improper motive where a rational basis can be inferred. *See Carlton*, 114 S. Ct. at 2025 (J. O'Connor, concurring). Last year, Justice O'Connor wrote that "the subjective motivation" of the legislative branch in enacting a statute "to the extent it can even be known" is irrelevant in the context of economic legislation and "it is sufficient for due process analysis if there exists *some* legitimate purpose underlying the retroactivity provision." *Carlton, 114 S. Ct. at 2025*. In fact, it may be impermissible for courts to delve into the legislature's motives where as in *Carlton* and here, a rational basis for the Act exists. *See Smithfield Concerned Citizens v. Town of Smithfield*, 907 F. 2d. 239, 246 (1st Cir. 1990) (actual purpose that may have motivated proponents of ordinance is irrelevant for rational basis analysis").

Even this Court has paused to acknowledge, "Sometimes the *pro tanto* approach will better promote settlement." *McDermott v. AmClyde*, 114 S. Ct. 1461, 1468 (1994). Ernst &

Young's reliance on *McDermott v. AmClyde* in support of its constitutional challenge is misplaced. In *McDermott v. AmClyde*, an admiralty case, this Court stated that "[a]lthough Congress has enacted significant legislation in the field of admiralty law, none of those statutes provide . . . any 'policy guidance' or imposes any limit on our authority to fashion the rule . . ." that will best answer the questions of which credit reduction rule the court should apply. *Id.* at 1464. *McDermott v. AmClyde* involved consideration of a non-statutory, court imposed contribution bar. *Id.* That case does not stand for the proposition that the *pro tanto* rule lacks rationality but simply for the proposition that in the absence of statutory guidance the proportionate fault method should be used in admiralty cases to calculate a non-settling defendant's liability. *See id.*

B. The Strong Incentive For Settlement Created By Affording Settling Alleged Joint Tortfeasors Contribution Protection And Posing The Prospect Of Non-Settling Joint Tortfeasors Paying More Than Their Proportionate Share Of Liability Justifies The Retrospective Operation Of The Act.

Miscasting itself as the "target" of the Act, Ernst & Young complains of the harm it may suffer from the Act's allowance of a *pro tanto* reduction credit in the amount of the settlement. In fact, the *pro tanto* method presents the possibility that a non-settling party may pay less than its proportionate share if the settlement amount for which it receives *pro tanto* credit is greater than the amount later determined at trial to be the settling party's equitable share. *McDermott v. AmClyde*, 114 S. Ct. at 1467 n.14. Ernst & Young is but one of at least one hundred alleged joint tortfeasors who risk the benefits and burdens of the Act. The Act affords every DEPCO-related

alleged joint tortfeasor an opportunity to seek the protective shelter of the Act by negotiating a settlement early.

Yet, consistent with its self-fabricated victim's role and in an apparent effort to convince the Court it is a "target", Ernst & Young mischaracterizes an argument proponents of the Act's constitutionality made below. Certain *amici* noted in their *amicus curiae* brief that: "[t]he classifications employed by the [ ] Act increase incentives to settle . . . by granting the settling DEPCO tortfeasor the finality of complete protection from contribution and equitable indemnity on the basis of an approved settlement irrespective of proportionate fault, and by presenting the non-settling DEPCO tortfeasor with the risk of being subject to a level of exposure in excess of its proportionate fault." *Amicus Curiae* Brief on Behalf of Certain Officers and Staff of Rhode Island Central Credit Union, 14, submitted in the proceeding below. Although the *amici* did not single out Ernst & Young in their example, Ernst & Young recasts the *amici's* argument to incorrectly convey that the purpose of the Act is to "coerce Ernst & Young, the only national 'deep pocket' sued by DEPCO into settling . . . by changing the law of contribution so as to expose Ernst & Young to the threat of enormous and disproportionate liability." *See* Petition at 17.

Ernst & Young's attack on the Act's rationality flies in the face of this Court's precedents. Quite simply, the prospect of disproportionate liability created by the Act's contribution bar and *pro tanto* set-off scheme "promotes early settlements and deters litigation for litigation's sake . . . ." *See United States v. Cannons Engineering Corp.*, 899 F.2d. 79, 92 (1st Cir. 1990) (discussing the analogous CERCLA contribution protection statute). Readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. *Usery v. Turner Elkhorn*, 428 U.S. at 16.

In its unrelenting campaign to cast the Act as unreasonable, Ernst & Young fails to mention that the appellate court in *TGB, Inc. v. Bendis*, 36 F.3d 916 (10th Cir. 1994) held that a district court impermissibly barred non-settling defendants' contribution claims against settling defendants because Congress had not authorized courts to bar federal statutory claims, *Id.* at 924. Indeed, the court in *TGB, Inc. v. Bendis* suggested Congress should follow the many states which have enacted statutes allowing contribution bars, and, further; cautioned that absent a law authorizing contribution protection, courts lack the power to bar federal statutory claims if they provide a specified reduction of any judgment against non-settling defendants. *Id.* at 924-925.

Ernst & Young overlooks the fact that the *TGB, Inc. v. Bendis* court identified five "unique incentives to settlement" that a contribution bar employing *pro tanto* credit creates: (1) a guarantee that the plaintiff will get whatever the jury awards at trial; (2) elimination of the risk of the plaintiff making a low settlement and collecting something less; (3) the ability for the plaintiff to fund further litigation; (4) the non-settling defendants post trial absorption of any shortfall of plaintiffs' settlement recovery discount; and (5) defendants' interest in avoiding paying more than their ratable share post-trial. *Id.* at 925. In other words, the line of cases upon which Ernst & Young relies to challenge the rational bases for the Act actually support the Act's rationality and stand for the proposition that interest in settlement cannot empower a court to bar contribution from claims under a *pro tanto* scheme without a statute authorizing the same. *See, e.g., id.*

II. THE ALLEGED CONFLICT BETWEEN THE DECISION BELOW AND THAT OF THE VIRGINIA COURT IN *SHIFLET* IS PROSPECTIVE AND DOES NOT JUSTIFY FURTHER REVIEW.

The Petitioner contends that the Virginia Supreme Court decision, *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), is at odds with the decision in the instant case. Petition at 19. The *Shiflet* case involved parties to an automobile accident in 1977. *Id.* at 117, 319 S.E.2d. at 752. The Shiflets brought negligence actions against two other drivers, *id.*, but in 1981 they executed a release with one of the two operators and reserved their claims with respect to Eller, the other driver, *id.* at 118, 319 S.E.2d. at 752. In 1979, Virginia enacted a statute which held that a release or a covenant not to sue, with regard to one of two or more persons who are jointly and severally liable in tort, does not release all other tortfeasors. *Id.* at 117, 119, 319 S.E.2d. at 752, 753. That new statute abrogated Virginia's common-law rule that a release of one tortfeasor is a release of all joint tortfeasors. *Shiflet*, 228 Va. at 119, 319 S.E.2d. at 753. The trial court granted Eller's motion to dismiss the Shiflets' action on grounds that the Shiflets' release of the other driver also operated as a release upon him. *Id.* at 118, 319 S.E.2d. at 752. On appeal, the Virginia Supreme Court concluded that because Eller's right to contribution arose in 1977, "it necessarily follows that the 1979 . . . statute . . . cannot be applied retroactively to impair that right." *Id.* at 121, 319 S.E.2d. at 750.

While it is true the Rhode Island Supreme Court found *Shiflet* unpersuasive, App.15a, it must be underscored that the *Shiflet* decision does not indicate whether it was based on the federal or Virginia constitution. Moreover, the Virginia court did not apply the rationality test and it offered no analysis of the

due process clause. In contrast, the Rhode Island Supreme Court applied the rational basis and relationship test and then added another layer of scrutiny by weighing the important public interests involved against any unfairness stemming from the retroactive application of the Act. App.15a, 16a. The court concluded that on balance any unfairness is outweighed by the public interests. App.15a, 16a.

Significantly, the *Shiflet* case neither involves a statute identical to the Act nor implicates a response to a statewide economic crisis. Ernst & Young has asked this Court to resolve a conflict that does not yet exist. *See* Petition at 19. It contends that "if Virginia enacted a statute identical to the Act . . . that statute would be . . . held unconstitutional." Petition at 19. Ernst & Young's request is premature inasmuch as the alleged conflict is prospective, at best.

III. ERNST & YOUNG HAS HAD AMPLE OPPORTUNITY TO BE HEARD.

Ernst & Young was afforded all process that is due and its assertions to the contrary were considered by the court below. It is apparent that Ernst & Young had an opportunity to be heard in the legislature. Indeed, Ernst & Young has been heard at every stage of this case. *See* App.22a. Ernst & Young was represented by counsel and expressed its viewpoint at the hearings in the proceedings below. *See* App.22a. Nonetheless, in purported support of its tortured claim that its procedural due process rights were violated, Ernst & Young cites additional cases dealing with hearing requirements for court imposed *pro tanto* contribution schemes. *See, e.g., In re Master Mates & Pilots Pension Plan*, 957 F.2d 1020, 1031 (2nd Cir. 1992); *In re Jiffy Lube Securities Litig.*, 927 F.2d 155, 160 n. 3 (4th Cir. 1991); *Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975).

The current argument is a favorite one of Ernst & Young. Ernst & Young, a party in *In re Jiffy Lube Securities*, 927 F.2d at 159, challenged the settlement in that case. *Id.* There, just as in this case, Ernst & Young was given an opportunity to be heard at a hearing on the settlement. *Id.* at 159. The *Jiffy Lube* court stated that the trial court did not have a specific duty of fairness to Ernst & Young beyond ensuring it had been afforded the opportunity to be heard. *Id.* Ernst & Young knows the routine and should not complain in this case where its procedural due process rights have been protected.

In the proceedings below, Ernst & Young sought and obtained an enlargement of time to be heard on the settlement issue in this case. The credit union litigation had been in progress for over four years before the parties sought approval of a settlement. Ernst & Young reviewed over one million documents in the litigation below. The Superior Court offered Ernst & Young the opportunity to present whatever evidence it wanted to at the hearing to consider whether the settlement should be approved. All Ernst & Young could do was complain that the Act was unfair because proportional fault was not assigned. In choosing not to offer any evidence as to the adequacy of the settlement, Ernst & Young made a tactical decision. Ernst & Young's conduct at the hearing was tantamount to standing silent. That decision and not the mechanics of the hearing is now driving the argument that Ernst & Young had no opportunity to be heard.

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). As this Court noted in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), once given the opportunity to be heard, a party can choose for himself whether to acquiesce or contest. The Act provides that there be a

judicially approved good faith settlement. As a third-party defendant, Ernst & Young was given notice and the opportunity to be heard on the issue of the good faith nature of the settlement. Nothing more is required.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted.

JAMES E. CARROLL
(Counsel of Record)
SHELIA HIGH KING
KIRSTEN M. LACOVARA
Peabody & Arnold
One Citizens Plaza, Suite 840
Providence, RI 02903
(401) 831-8330

Attorneys for Respondents

Wilhelmina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Marisi Viau, John Doe and Jane Doe, Former Directors of Brown University Employees Credit Union

October 16, 1995

95-445

Supreme Court, U.S.
FILED
OCT 17 1995
CLERK

No. 95-

In The
Supreme Court of the United States
October Term, 1995

ERNST & YOUNG LLP, ET AL.,

Petitioners,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, ET AL.

Respondents.

Petition For Writ of Certiorari To The Supreme Court of Rhode Island

BRIEF OF *AMICUS CURIAE* RHODE ISLAND SOCIETY OF CPAS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STEPHEN S. OSTRACH
(Counsel of Record)
CYNTHIA L. AMARA
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, MA 02111
(617) 695-3660

October 16, 1995

13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

ARGUMENT: REASONS FOR GRANTING THE WRIT . . 2

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS ERRONEOUS BECAUSE THE ACT'S RETROACTIVE DEPRIVATION OF ERNST & YOUNG'S RIGHT TO CONTRIBUTION LACKS A RATIONAL BASIS . 3

A. Retroactive Legislation Should Be Viewed With Skepticism And Must Have A Rational Basis. 3

B. The Retroactive Deprivation Of A Private Party's Property Interest Is Fundamentally Unfair And Should Not Be Sanctioned. 5

II. THE DECISION BELOW CONFLICTS WITH FEDERAL DECISIONS HOLDING THAT NON-SETTLING PARTIES HAVE A DUE PROCESS RIGHT TO MEANINGFUL PARTICIPATION IN SETTLEMENT PROCEEDINGS. . 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

General Motors Corp. v. Romein, 503 U.S. 181 (1992) 5

Girsh v. Jepson, 521 F.2d 153 (3d. Cir. 1975) 8

Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1967) 9

In re Del-Val Fin. Corp. Sec. Litig., 868 F. Supp. 547 (S.D.N.Y. 1994). 8

In re Jiffy Lube Sec. Litig., 927 F.2d 155 (4th Cir. 1991) 8

In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020 (2nd Cir. 1992) 8

Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994) 4, 5

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 2

McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994) 5, 6

O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) 6

Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 5

Rhode Island Depositors Economic Protection Corp. v. Brown (In re Advisory Opinion to the Governor), 659 A.2d 95 (R.I. 1995) 2, 3

Shiflet v. Eller, 228 Va. 115, 39 S.E.2d 750 (1984) 4, 7

TBG, Inc. v. Bendis, 36 F.3d 916 (10th Cir. 1994) 7

United States v. Carlton, 114 S. Ct. 2018 (1994) 6

United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth., 772 F. Supp. 1565 (D.S.C. 1991) 7

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 5

Winstar Corp. v. United States, 64 F.3d 1531, 64 U.S.L.W. 2133 (Fed. Cir. 1995) 6, 7

STATUTORY PROVISIONS

R.I. Gen. Laws §§10-6-7,10-6-8 and 10-6-11 2

R.I. Gen. Laws §42-116-40, P.L. 1993, ch. 85, §1 2

INTEREST OF AMICUS

The Rhode Island Society of Certified Public Accountants ("Society" or "Amicus") is a non-profit professional association founded in 1905. It currently has over 1400 members throughout Rhode Island. The Society's objectives include advocating for the profession of accountancy, maintaining high ethical standards for the profession, promoting and maintaining the profession's Code of Ethics. The Society's interest in this case includes its concern that the decision below may reduce the predictability required to provide professional accounting services to businesses and the public.

More broadly, the Society is concerned that the decision below may encourage other states faced with similar budget crises to adopt other legislation which could be used not only to hold viable firms liable for a disproportionate share of tort liability but also to generate state revenues by retroactively abrogating recognized property interests. The Society believes that the petition of Ernst & Young LLP ("Ernst & Young") should be granted so its members and the community at large may obtain a definitive resolution of the legality of such efforts.

Pursuant to Supreme Court Rule 37.2, the Society has obtained consent for the filing of this amicus brief from counsel for the petitioner and the respondents.

STATEMENT OF THE CASE

The Society accepts and relies upon the statement of the case contained in the Petition. Pet. at 2-10.

ARGUMENT: REASONS FOR GRANTING THE WRIT

The single issue presented by this case is whether a state can retroactively abrogate a private litigant's constitutionally protected right to contribution in order to better its own financial position in that litigation. Rhode Island's effort to coerce Ernst & Young and other businesses into settling litigation with DEPCO, a state agency, not only violates their constitutional due process protections against arbitrary state power but also encourages similar behavior by other governmental entities. Such governmental disregard for private property interests should not be sanctioned.

On July 13, 1993, R.I. Gen. Laws § 42-116-40 (the "Act") was signed into law by the Governor. The Act was enacted two years after the credit union collapse and one year after filing of DEPCO's suit against Ernst & Young. Prior to this law, a non-settling defendant in a case arising out of the Rhode Island credit union collapse was treated like any other tort defendant. If ultimately found liable (or if it received a proportionate fault release), it could seek contribution from all other joint tortfeasors except those who had received releases against all other responsible parties. See R.I. G.L. c. 10 - 6 (Uniform Contribution Among Joint Tortfeasors Act); Rhode Island Depositors Economic Protection Corp. v. Brown, 659 A.2d 95 (R.I. 1995). Pet. at 5a. Contribution would be based upon the other tortfeasors' "proportionate share of liability." Id.

The Act changed that result by allowing any settling party in a DEPCO case to cap its total liability to the detriment of non-settling parties. The Act only applies to claims brought by DEPCO and receivers for Rhode Island-chartered financial institutions. In

all other cases, Rhode Island's traditional rule requiring proportionate fault releases (or leaving settling parties liable for contribution) remains in effect. The decision of the Rhode Island Supreme Court makes it clear that the 1993 Act applies to all pending DEPCO cases, including those begun prior to its passage.

The Rhode Island Supreme Court conceded that Ernst & Young's pre-existing right to contribution "is properly viewed as a property interest subject to the protections of due process." DEPCO v. Brown, supra, Pet. at 12a citing Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). Rhode Island, like most states, treats the right to contribution as a right arising at the time of the underlying tort, not at the later time that a losing defendant is ordered to pay a judgment. Id.. Since Ernst & Young's right to contribution from other DEPCO defendants arose prior to 1993, the application of Act to this litigation is clearly retroactive. Id.

The Act violates Ernst & Young's due process rights by changing the contribution rules in the middle of DEPCO's lawsuit against Ernst & Young, thereby retroactively depriving Ernst & Young of its pre-existing property right to contribution. The Act retroactively extinguished Ernst & Young's right to pursue contribution from parties who settle with DEPCO. Moreover, the Act provides that any judgment assessed against Ernst & Young will be reduced not by the settling parties' proportionate share of the losses, but only by the amounts actually paid in settlement - a so-called "pro tanto" reduction.

Unlike similar "pro tanto" schemes in certain other jurisdictions, the Act, as interpreted by the Rhode Island courts, does not require a settling defendant to show that the settlement is related to its equitable share of the judgment. Consequently, a court may approve a settlement and offer the settling party contribution protection, even if the settlement is grossly inadequate in comparison to the settling party's true share of liability.

The Act places non-settling parties, such as Ernst & Young, at a severe disadvantage compared to the prior law. Under the Act, a non-settling party may be forced to absorb the difference between the damages caused by a settling party and whatever amount DEPCO accepts from that party in settlement, no matter how insignificant or how disproportionate to the settling party's degree of fault. The Act, therefore, allows DEPCO to settle cheaply with certain parties while leaving Ernst & Young and other potential "deep pockets" liable not only for their own share of the fault (if any), but also for any shortfall caused by the settlement figures.

This gives DEPCO, i.e. the State of Rhode Island, an unwarranted financial advantage at the expense of a private party. Such an outcome is grossly unfair and, therefore, legally insufficient to provide the "rational" basis needed to withstand a constitutional challenge. Moreover, by changing the contribution rules in the middle of the litigation, the state has unfairly pressured Ernst & Young to settle the DEPCO litigation. Retroactive legislation targeted at a specific party cannot constitute a "legitimate" goal for purposes of constitutional analysis and, therefore, should be held unconstitutional. See Shiflet v. Eller, 228 Va. 115, 39 S.E.2d 750 (1984).

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS ERRONEOUS BECAUSE THE ACT'S RETROACTIVE DEPRIVATION OF ERNST & YOUNG'S RIGHT TO CONTRIBUTION LACKS A RATIONAL BASIS.

A. Retroactive Legislation Should Be Viewed With Skepticism And Must Have A Rational Basis.

The state's ability to retroactively deprive a party of a constitutionally protected property interest is an extraordinary power that can so drastically distort reasonable expectations that it should be

reserved for the most extraordinary of cases. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1497 (1994). One major concern about such laws is that "the Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration... and that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Id. See also General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)("problems of unfairness are more serious for retroactive laws than for prospective ones"). That is exactly what the Rhode Island legislature seems to have done in the wake of the RISDIC collapse.

To be consistent with due process, a retroactive statute, like any statute, may not abrogate a property interest unless that action is, at a minimum, justified by a legitimate governmental purpose furthered by rational means. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). However, due to the careful scrutiny given to retroactive legislation, "a justification sufficient to validate a statute's prospective application under the [due process clause] 'may not suffice' to warrant its retroactive application." Landgraf, 114 S. Ct. at 1497 (quoting Usery v. Turner Elkhorn Mining Co, 428 U.S. 1, 17 (1976)). Not only the statute generally but also the retroactive effect of the statute in particular must satisfy the demands of due process.

B. The Retroactive Deprivation Of A Private Party's Property Interest Is Fundamentally Unfair And Should Not Be Sanctioned.

The court below justified the law as furthering the goal of facilitating DEPCO settlements and so "minimizing the taxpayers' liability." Only last year, this Court rejected that position and held that the pro tanto rule has no clear advantage over the proportionate share rule in promoting settlements. This Court explained that

under either rule parties' desire to settle cases is adequate to ensure nontrial dispositions in the vast majority of cases. See McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1468-69 (1994). The Court noted that the pro tanto rule "comes at too high a price in unfairness." Id. The Rhode Island law is even more unfair than the approach rejected in McDermott. As interpreted by the R.I. Supreme Court in the Brown credit union case, proportionate fault is simply not a necessary consideration in approval of a settlement under the Act. Although the Act makes settlements less risky for DEPCO, it does so at the expense of private parties. DEPCO now can settle with parties for any amount regardless of their proportionate fault without giving up anything because the "deep pocket" of Ernst & Young will remain available for any shortfall.

Clearly, the state is seeking to minimize its cost for a bail-out that it chose to assume, at the expense of private litigants. However, the fact that changing the litigation rules in favor of the government will save it money is insufficient to withstand a constitutional challenge. See O'Melveny & Myers v. FDIC, 114 S. Ct. 2048, 2055 (1994) (ability to obtain more money did not justify special government rights in litigation). In light of the ever present temptation for governments to disregard fair play and existing property interests when faced with a financial crunch, such tactics should be firmly rejected. See, e.g. Winstar Corp. v. United States, 64 F.3d 1531, 64 U.S.L.W. 2133 (Fed. Cir. 1995)(retroactive legislation cannot be used to improve the sovereign's financial position vis-a-vis private parties).

Enhancing the government's potential to obtain more money, at the expense of a private party, does not justify tilting the playing field in favor of the government, particularly during ongoing litigation. Such tactics are patently unfair and should not be sanctioned, particularly where, as here, there is every indication that the state acted with the improper motive of targeting a specific party involved in a specific lawsuit. See Pet. at 7. Cf. United States v. Carlton, 114 S. Ct. 2018, 2023 (1994) (retroactive

limitation of the availability of a tax provision upheld since there was no contention of improper governmental motive such as targeting certain taxpayers for unfair treatment).

By changing the rules of contribution the state has drastically increased the pressure on Ernst & Young to settle the DEPCO litigation. "To the extent there is tension between the goal of promoting settlements and fundamental fairness to litigants, the latter must prevail." TBG, Inc. v. Bendis, 36 F.3d 916,925 (10th Cir. 1994)(quoting United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth., 772 F. Supp. 1565, 1575 (D.S.C. 1991)). Clearly, there is nothing legitimate in the state changing the rules in a manner that disproportionately disadvantages Ernst & Young in pending litigation with the state. Cf. Winstar, supra. Since the state cannot show a "legitimate" end for the retroactive nature of the Act, it should be held unconstitutional. See Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984) (law retroactively changing the state's contribution rule held unconstitutional).

Sound policy dictates that the Act be declared unconstitutional since to do otherwise would encourage Rhode Island and other states to abrogate vested property interests merely to offset their own financial obligations. Such retroactive state action undermines the predictability required by businesses and professionals to effectively provide services to their clients and customers.

II. THE DECISION BELOW CONFLICTS WITH FEDERAL DECISIONS HOLDING THAT NON-SETTLING PARTIES HAVE A DUE PROCESS RIGHT TO MEANINGFUL PARTICIPATION IN SETTLEMENT PROCEEDINGS.

Additionally, the court below erred in approving the settlement without requiring that Ernst & Young be provided with a meaningful opportunity to participate in the settlement approval process.

Since the Act bars non-settling parties from seeking contribution from settling parties and allows only "pro tanto" setoffs, Ernst & Young has a compelling interest in ensuring that DEPCO's settlements with other parties are reasonable. In such circumstances, a number of federal courts have held that non-settling parties must be afforded a meaningful opportunity to participate in settlement approval proceedings. See e.g. , In re Masters Mates & Pilots Pension Plan, 957 F.2d 1020 (2nd Cir. 1992); In re Jiffy Lube Sec. Litig., 927 F.2d 155, 160 n.3 (4th Cir. 1991). Under these decisions, when a third party objects to a settlement, federal courts must "at least evaluate [their] contentions" and "provide [them] with an opportunity for meaningful exposition of their positions." Girsh v. Jepson, 521 F.2d 153, 160 (3d Cir. 1975) (disapproving settlement where third party was denied meaningful participation in fairness hearing). In doing so, the courts consider whether the settling parties made a good faith effort to evaluate the settling parties proportionate liability. See In re Del-Val Fin. Corp. Sec. Litig., 868 F. Supp. 547, 559 (S.D.N.Y. 1994).

The Rhode Island courts however, have determined that the Act allows no such opportunity. Here, during the two weeks between the filing of DEPCO's case against the officers and the settlement, Ernst & Young tried to participate in order to obtain and present evidence on damages, relative strength of the parties' cases, and defendants' financial resources. Pet. at 22. The lower court, affirmed by the Supreme Court, rejected that effort. The pro forma order that the settlement was "fair and reasonable [and] made in good faith . . . " did not reference Ernst & Young's adversely impacted interest or, in view of the denial of its effort to participate, is it a constitutionally binding determination against Ernst & Young.

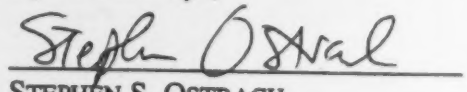
Affording a third party an opportunity to meaningfully participate in a settlement helps to decrease the prospect that a plaintiff will accept inadequate settlements from one or more tortfeasors in situations where a perceived "deep pocket" exists

from whom the remainder of any judgment may be collected. Such participation is necessary in light of the fact that the pro tanto rule itself leaves "the field of settlement very much open to collusive arrangements between a plaintiff and a favored joint tortfeasor." Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1967). This Petition should be granted to reestablish the longstanding principle that fundamental fairness in litigation is not disposable at the unilateral whim of a government plaintiff.

CONCLUSION

For the reasons set forth above, the Society respectfully requests that this Court grant the petition for a writ of certiorari and reverse the decision of the Rhode Island Supreme Court.

Respectfully submitted,
RHODE ISLAND SOCIETY OF CPAS
By its attorneys,



STEPHEN S. OSTRACH
(Counsel of Record)
CYNTHIA L. AMARA
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln St.
Boston, MA 02111
(617) 695-3660

DATED: Boston, Massachusetts: October 16, 1995.

Supreme Court, U.S.
FILED
OCT 23 1995
OFFICE OF THE CLERK

(6)

No. 95-445

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

PETITIONER'S REPLY MEMORANDUM

KATHRYN A. OBERLY
787 Seventh Avenue
New York, N.Y. 10019
(212) 773-2500

J. ANDREW HEATON
(Counsel of Record)
1225 Connecticut Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 327-9820

Attorneys for Petitioner

Of Counsel:
DANIEL F. KOLB
JEROME G. SNIDER
Davis Polk & Wardwell
450 Lexington Avenue
New York, N.Y. 10017

PETER J. MCGINN
Tillinghast, Collins & Graham
10 Weybosset Street
Providence, R.I. 02903

13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
DISCUSSION	1

TABLE OF AUTHORITIES

Cases:	Page
Bragger v. Trinity Capital Enter. Corp., No. 92 Civ. 2124, 1993 U.S. Dist. LEXIS 10087 (S.D.N.Y. July 23, 1993)	7
Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160 (W.D. Va. 1983)	6
Del-Val Fin. Corp. Sec. Litig., In re, 868 F. Supp. 547 (S.D.N.Y. 1994)	7
Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)	8, 9
Jiffy Lube Sec. Litig., In re, 927 F.2d 155 (4th Cir. 1991)	7
Leftwich v. Bevilacqua, 635 F. Supp. 238 (W.D. Va. 1986)	6
McDermott, Inc. v. AmClyde, 114 S. Ct. 1461 (1994)	4
Potomac Hosp. Corp. v. Dillon, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 474 U.S. 971 (1985)	6
Rhode Island Depositors Economic Protection Corp. v. Brown (In re Advisory Opinion to the Governor), 659 A.2d 95 (R.I. 1995)	*passim*
Shiflet v. Eller, 228 Va. 115, 319 S.E.2d 750 (1984)	6

Statutes and Constitutional Provisions:	
U.S. Const. amend. XIV, § 1	*passim*
R.I. Gen. Laws § 42-116-40, P.L. 1993, ch. 85	*passim*
R.I. Gen. Laws § 10-6-8	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NO. 95-445

ERNST & YOUNG LLP,

Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

---

PETITIONER'S REPLY MEMORANDUM

The briefs of DEPCO and the receivers ("DEPCO Br.") and of the Brown credit union directors ("Dir. Br.") attempt to obscure the central point of Ernst & Young's petition: by upholding the Act, the Rhode Island Supreme Court held, in substance, that a state may change the rules in the middle of a lawsuit between the state and a private party, and thereby deprive the private party of a recognized property interest, for no better reason than to improve the state's own position in the lawsuit. We are aware of no authority — and respondents have cited none — suggesting that this kind of blatant attempt to tilt the scales of justice in favor of the state is consistent with due process.

1. In their effort to articulate a legitimate purpose for the Act, respondents suggest that the Act was necessary to protect settling defendants from contribution claims and thereby encourage settlements. But in doing so, respondents have misrepresented both the effect of the Act and the law in Rhode Island as it existed before the Act was adopted.

a. Respondents suggest that the prior law (which is still in effect for all but the small number of cases governed by the Act) "imped[ed] settlement" because, "as a general rule," settling parties remained "potentially liable to other defendants" for contribution, which "ma[de] it impossible for one tortfeasor alone to take a release and close the file." DEPCO Br. 11, 3, 10. In fact, there never was any "general rule" that settling parties would remain liable for contribution in Rhode Island. To the contrary, the prior law clearly provided that settling defendants could be shielded from contribution, at the plaintiff's option, so long as the non-settling defendants were released from the settling party's proportionate share of liability. *See* R.I. Gen. Laws 10-6-8. The Act did not change the availability of contribution protection for settling parties; it changed the type of set-off provided to *non*-settling parties. Under the Act, the liability of non-settling parties is reduced by the amount of the settlement (*pro tanto*), rather than by the settling party's proportionate share of liability.

Thus, the notion that the Act was needed to protect settling parties from contribution claims is a fiction. Under the prior law, plaintiffs (including DEPCO) always had the ability to provide settling parties with such protection. DEPCO was not unable to protect settling parties from contribution claims; it merely chose not to do so.[1]

---

[1] The notion that settlement efforts were unsuccessful because DEPCO "would not agree to provide unlimited indemnification" to settling

b. Respondents suggest that the "principal thrust" of the Act was to "adjust potential liability among the various tort-feasors . . . not among DEPCO and the defendants." DEPCO Br. 12. In fact, the opposite is true. The Act takes rights away from non-settling parties such as Ernst & Young, but (as noted above) it does not give settling defendants anything they could not have been given under prior law. Instead, the beneficiary of the Act is DEPCO. DEPCO can now achieve the same result it could have achieved under the prior law — encouraging settlements by offering contribution protection to settling parties — but it can do so without having to provide proportionate fault releases to non-settling defendants.

It is true, as respondents contend, that under the prior law, DEPCO (like every other plaintiff) had to accept the risk that entering into inadequate settlements with settling defendants would leave it "at risk of insufficient recovery." DEPCO Br. 11. Indeed, that is precisely our point. The effect of the Act is to shift the risk that DEPCO will enter into inadequate settlements away from DEPCO itself and onto Ernst & Young — and to do so retroactively, in the middle of litigation between DEPCO and Ernst & Young.

c. The fact that other jurisdictions have adopted *pro tanto* contribution rules as generally applicable law, or that Congress has properly enacted retroactive tax measures in some cases, in no way suggests that the Act is consistent with due process. Unlike the Act, the application of these statutes does not depend on the identity of the plaintiff, nor were

---

parties (Dir. Br. 5) is incorrect. There was no need for indemnification under the prior law, because DEPCO could provide contribution protection by offering non-settling parties a proportionate share release. This is not, as respondents would have it, Ernst & Young's "own solution to the problem" (DEPCO Br. 11): it is the solution that was provided by Rhode Island law.

these statutes enacted for the purpose of affecting pending litigation involving the state. None of these general laws, in short, comes with the baggage that renders the Act infirm.

We do not contend that a legislature could not constitutionally decide, as a matter of general policy, that non-settling alleged tortfeasors, rather than plaintiffs, should bear the risk of inadequate settlements.[2] We do contend, however, that a state legislature may not *retroactively* reallocate that risk in a manner that benefits a state entity in its litigation against a non-settling defendant, and that deprives the defendant of an existing property interest recognized by state law.

2. The record amply supports Ernst & Young's contention that it was the intended target of the Act. As we noted in our petition, DEPCO's trial counsel argued before the legislature that the Act's purpose was to force Ernst & Young to settle the lawsuit brought by DEPCO, and that the law should be changed only in his litigation to benefit his client. Pet. 7. We noted that DEPCO's counsel had not denied making such statements, and had offered no evidence to rebut the affidavit

---

[2] It is of course true that *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994), in which this Court unanimously adopted the proportionate fault approach for admiralty cases, does not mean that a state is precluded from adopting a different approach. *McDermott* does, however, undercut the notion that a statute abandoning the proportionate fault approach in favor of a *pro tanto* rule is rationally related to the purpose of facilitating settlements. *See id.* at 1468, 1469 (*pro tanto* rule has "no clear advantage in promoting settlements," and any pressure to settle resulting from that rule is "unnecessary" and "comes at too high a price in unfairness").

on these points presented by Ernst & Young. *Id.* n.2.[3] Having now had an additional opportunity to take direct issue with these statements in their brief, DEPCO's counsel *still* has not done so. Instead, DEPCO argues that the court below "necessarily and properly rejected" the contention that the Act targeted Ernst & Young. DEPCO Br. 14 n.15. That is simply not true, as even a cursory reading of the opinion below makes clear. The court merely held that the Act was not intended to *punish* Ernst & Young within the meaning of the bill of attainder clause. Pet. App. 19a.

In fact, as we noted in our petition, it was a matter of public knowledge that the Act was targeted at Ernst & Young. Pet. 7. Respondents do not even try to explain why, if the notion that Ernst & Young was the target of the Act is a fantasy, two writers for two Rhode Island newspapers who followed the proceedings in the Rhode Island legislature apparently suffered from the same delusion.

There is a simple reason why the Act was directed at Ernst & Young. Although there are many other parties who are potentially liable for the "credit union crisis" — in particular, officers and directors of RISDIC and the credit unions, who had direct responsibility for managing the institutions (unlike Ernst & Young, which merely served as outside auditor for some of the institutions in certain years) — Ernst & Young is the only large, national, "deep pocket" defendant. DEPCO's strategy, as we noted in the court below, has been to attempt to settle cheaply with the other defendants and

---

[3] The affiant was a senior lawyer for Ernst & Young who followed the legislative proceedings and was familiar with the arguments made by DEPCO's counsel. It is noteworthy that, having had a clear opportunity to deny making the statements in question, DEPCO's counsel instead chose to comment on the source of the affidavit. *See* DEPCO Br. 14 n.15.

then to coerce Ernst & Young into a large settlement by threatening to hold it liable for the shortfall. *See* Affidavit of William P. Hammer ¶ 5, submitted in the proceedings below. The Act made this strategy possible.[4]

3. The conflict between the decision below and the Supreme Court of Virginia's decision in *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), is quite real. If there were any doubt about the meaning of *Shiflet* when that case was decided, that doubt was erased by the same court's decision a year later in *Potomac Hospital Corp. v. Dillon*, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 474 U.S. 971 (1985). In that case, the court characterized *Shiflet* as holding not that a retroactive abrogation of a right to contribution is prohibited by Virginia *statutory* law, but that such an action *"violates due process and is therefore unconstitutional."* *Id.* at 360, 329 S.E.2d at 44-45 (emphasis added).

Respondents fail to mention *Potomac Hospital*. They also fail to note that the *Shiflet* court cited not only two state cases on statutory construction, but also a federal court decision from Virginia, *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160, 164-165 (W.D. Va. 1983), in which the court held that the retroactive abrogation of a right to contribution violated the federal due process clause.[5] The citation to

---

[4] To this extent, it might indeed be said that the Act promotes settlement by threatening non-settling parties with enormous and disproportionate liability. *See* Dir. Br. 5, 12. As we noted in our petition, however, depriving Ernst & Young of a property interest in order to coerce Ernst & Young into a settlement cannot constitute a rational means of furthering a legitimate purpose. Pet. 16-17.

[5] Although the citation to *Carickhoff* makes reasonably clear that *Shiflet* was based upon the federal due process clause, it does not matter whether the Court had the federal or the state clause in mind: they are

Carickhoff makes clear that, as the court itself later held in *Potomac Hospital*, *Shiflet* is a due process decision. Whether *Shiflet* arguably *could* have been decided on purely statutory grounds is beside the point.

4. The failure of the Act, as interpreted by the Rhode Island Supreme Court, to afford non-settling parties a meaningful opportunity to participate in settlement proceedings affecting their rights provides an additional and independent basis for this Court to grant certiorari.[6] Respondents' argument that Ernst & Young was permitted to file a brief and appear at a hearing in connection with the Brown settlement — and that "the cases cited by [Ernst & Young] call for nothing more" than this (DEPCO Br. 16; *see also id.* at 9) — is false. In fact, the cases cited in our petition require substantially more than the limited participation afforded to Ernst & Young. These cases are in direct conflict with the result in the court below.

For instance, in *In re Jiffy Lube Securities Litigation*, 927 F.2d 155 (4th Cir. 1991), the court held that where a settlement exposes the non-settling defendant to excess liability — as the Brown settlement did — the non-settling party must be

---

coextensive. *See* Pet. 19 n.5, citing *Leftwich v. Bevilacqua*, 635 F. Supp. 238, 243 (W.D. Va. 1986).

[6] Respondents' weak suggestion that this argument might not have been preserved in the trial court (DEPCO Br. 16 & n.17) is meritless. *None* of the constitutional arguments was briefed in any detail in the trial court: that was one reason why Ernst & Young argued that the court below should not decide the constitutional issues. *See id.* at 5. Nevertheless, the Rhode Island Supreme Court accepted the certified questions from the trial court — including "[w]hether the [Act] violate[s] the Due Process Clause of the Fourteenth Amendment" (Pet. App. 1a) — and addressed those questions in a legally binding opinion. The present issue was fully addressed by both sides in the proceeding below.

permitted to participate not just in *some* hearing, but in a hearing that "focus[es] on [the] *fairness of the settlement to the non-settling defendant.*" *Id.* at 160 n.3 (emphasis added). *Accord In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 559 (S.D.N.Y. 1995); *see also Bragger v. Trinity Capital Enter. Corp.*, No. 92 Civ. 2124, 1993 U.S. Dist. LEXIS 10087, at *6 (S.D.N.Y. July 23, 1993) (court considered deposition transcripts and other evidence offered at hearing in considering fairness of settlement to non-settling parties).

Respondents' contention that *Jiffy Lube* imposes no special duty of fairness to non-settling parties (Dir. Br. 16) is a complete misreading of the case. The *Jiffy Lube* court did say that if the non-settling party is given a *proportionate share* set-off — the type of set-off to which Ernst & Young would be entitled were it not for the Act — then the non-settling party would be entitled only to a basic right to be heard. But the court also made it clear that if the non-settling party receives only a *pro tanto* set-off — the type of set-off provided by the Act — then "a separate hearing on fairness *from the perspective of the non-settling defendant*" is required. *Jiffy Lube*, 927 F.2d at 160 & n.3 (emphasis added).

Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975), confirms that merely filing a brief and taking part in a hearing does *not* amount to the kind of meaningful participation in the process to which a non-settling party is entitled under a *pro tanto* set-off scheme such as the Act. In *Girsh*, the trial court permitted an objector to a settlement to do both of these things. (Moreover, like Ernst & Young here, the objector had obtained a brief extension of time in order to do so.) However, the court rejected the objector's complaints about the "sparseness of the record," and denied her efforts to obtain information from the settling parties relevant to the reasonableness of the settlement. *Id.* at 156, 157. On these facts, the Third Cir-

cuit reversed the trial court's approval of the settlement. It concluded that the objector had not been given "an opportunity for *meaningful* exposition" of her position because she was "not afforded an adequate opportunity to test" the "strengths and weaknesses" of the settlement. *Id.* at 160, 157 (emphasis added). In addition, the court found that the trial court had erred by not "evaluat[ing] all the contentions of the parties," including the objector. *Id.* at 160.

What happened in the trial court in *Girsh* is precisely what happened to Ernst & Young in the *Brown* matter. Ernst & Young was allowed to file a brief and attend a hearing, but was denied the opportunity to obtain and present evidence relevant to the fairness of the settlement. *See* Pet. 22.[7] Moreover, the court did not consider whether the settlement would improperly infringe on the rights of third parties such as Ernst & Young. It approved the settlement as "in the best interests of *the moving parties and the receivership estates*" (Pet. App. 26a) (emphasis added), but it made no mention of whether the settlement adequately protected Ernst & Young's interests.

Thus, like the objector in *Girsh*, Ernst & Young did not receive the *meaningful* opportunity to participate that is

---

[7] Respondents make much of the notion that Ernst & Young had received "massive discovery" in the overall credit union litigation. DEPCO Br. 5 n.6; *see also* Dir. Br. 16. In fact, there had been very little discovery relating to the Brown credit union. At the time that DEPCO and the credit union receiver made their files available for inspection by Ernst & Young, the case that was eventually settled — DEPCO's suit against the Brown directors — did not exist. Moreover, Brown was not, and was unlikely to become, a focus of DEPCO's suit against Ernst & Young. (Ernst & Young never issued any audit report on Brown.) It was only after the document discovery in question was completed that the Brown complaint was filed and Ernst & Young brought in as a third-party defendant.

required under federal case law. The Rhode Island Supreme Court's affirmance of the settlement — confirming the trial court's interpretation of what the Act requires for the approval of a settlement — makes clear that the Act is at odds with *Girsh* and other federal decisions.

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHRYN A. OBERLY
787 Seventh Avenue
New York, New York 10019
(212) 773-2500

J. ANDREW HEATON
(Counsel of Record)
1225 Connecticut Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 327-9820

Attorneys for Petitioner

OCTOBER 23, 1995